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Report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session

4-15 July 2005

General Assembly

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Sixtieth session
Supplement No. 17 (A/60/17)

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Note

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I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the thirty-eighth session of the Commission, held in Vienna from 4 to 15 July 2005.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, the report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

II. Organization of the session

A. Opening of the session

3. The thirty-eighth session of the Commission was opened on 4 July 2005.

B. Membership and attendance

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. By its resolution 57/20 of 19 November 2002, the General Assembly further increased the membership of the Commission from 36 States to 60 States. The current members of the Commission, elected on 16 October 2000 and 17 November 2003, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated:[1] Algeria (2010), Argentina (2007), Australia (2010), Austria (2010), Belarus (2010), Belgium (2007), Benin (2007), Brazil (2007), Cameroon (2007), Canada (2007), Chile (2007), China (2007), Colombia (2010), Croatia (2007), Czech Republic (2010), Ecuador (2010), Fiji (2010), France (2007), Gabon (2010), Germany (2007), Guatemala (2010), India (2010), Iran (Islamic Republic of) (2010), Israel (2010), Italy (2010), Japan (2007), Jordan (2007), Kenya (2010), Lebanon (2010), Lithuania (2007), Madagascar (2010), Mexico (2007), Mongolia (2010), Morocco (2007), Nigeria (2010), Pakistan (2010), Paraguay (2010), Poland (2010), Qatar (2007), Republic of Korea (2007), Russian Federation (2007), Rwanda (2007), Serbia and Montenegro (2010), Sierra Leone (2007), Singapore (2007), South Africa (2007), Spain (2010), Sri Lanka (2007), Sweden (2007), Switzerland (2010), Thailand (2010), the former Yugoslav Republic of Macedonia (2007), Tunisia (2007), Turkey (2007), Uganda (2010), United Kingdom of Great Britain and Northern Ireland (2007), United States of America (2010), Uruguay (2007), Venezuela (Bolivarian Republic of) (2010) and Zimbabwe (2010).

5. With the exception of Benin, Ecuador, Fiji, Gabon, Israel, Lebanon, Madagascar, Mongolia, Pakistan, Rwanda, the former Yugoslav Republic of Macedonia, Uganda and Uruguay, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Angola, Antigua and Barbuda, Azerbaijan, Bulgaria, Costa Rica, Cuba, Democratic Republic of the Congo, Denmark, El Salvador, Finland, Greece, Hungary, Indonesia, Iraq, Ireland, Kuwait, Latvia, Myanmar, Peru, Philippines, Portugal, Romania, Senegal, Slovakia, Slovenia, Ukraine and Yemen.

7. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: United Nations Conference on Trade and Development, United Nations Environment Programme, World Bank and International Monetary Fund;

(b) *Intergovernmental organizations*: Association of Law Reform Agencies of Eastern and Southern Africa, Council of Europe, European Commission, Hague Conference on Private International Law and International Institute for the Unification of Private Law;

(c) *Non-governmental organizations invited by the Commission*: American Bar Association, American Bar Foundation, Cairo Regional Centre for International Commercial Arbitration, Center for International Legal Studies, Centro de Estudios de Derecho, Economia y Politica, European Law Students' Association, Forum for International Commercial Arbitration, Groupe de réflexion sur l'insolvabilité et sa prévention, INSOL International (INSOL), International Bar Association, International Council for Commercial Arbitration, International Insolvency Institute, International Law Institute, International Swaps and Derivatives Associations, Kuwait Fund for Arab Economic Development, Law Association of Asia and the Pacific, Moot Alumni Association, Union internationale des avocats and W. C. Vis International Commercial Arbitration Moot.

8. The Commission welcomed the participation of international non-governmental organizations with expertise in the major items on the agenda. Their participation was crucial for the quality of texts formulated by the Commission and the Commission requested the Secretariat to continue to invite such organizations to its sessions.

C. Election of officers

9. The Commission elected the following officers:

Chairman:	Jorge Pinzón Sánchez (Colombia)
Vice-Chairpersons:	Jeffrey Wah Teck Chan (Singapore)
	Petr Havlik (Czech Republic)
	Karen Mosoti (Kenya)
Rapporteur:	Colin Minihan (Australia)

D. Agenda

10. The agenda of the session, as adopted by the Commission at its 794th meeting, on 4 July 2005, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Finalization and adoption of a draft convention on the use of electronic communications in international contracts.
5. Procurement: progress report of Working Group I.
6. Arbitration: progress report of Working Group II.
7. Transport law: progress report of Working Group III.
8. Security interests: progress report of Working Group VI.
9. Monitoring implementation of the 1958 New York Convention.
10. Case law on UNCITRAL texts, digests of case law.
11. Technical assistance to law reform.
12. Status and promotion of UNCITRAL legal texts.
13. Relevant General Assembly resolutions.
14. Coordination and cooperation:
    (a) General;
    (b) Insolvency law;
    (c) Electronic commerce;
    (d) Commercial fraud;
    (e) Reports of other international organizations.
15. Other business.
16. Date and place of future meetings.
17. Adoption of the report of the Commission.

E. Adoption of the report

11. At its 810th and 811th meetings, on 15 July 2005, the Commission adopted the present report by consensus.

III. Finalization and approval of a draft convention on the use of electronic communications in international contracts

A. Organization of deliberations

12. The Commission considered the revised version of the draft convention, which included the articles adopted by the Working Group at its forty-fourth session (Vienna, 11-22 October 2004), as well as the draft preamble and final provisions, on which the Working Group had only held a general exchange of views at that time, as contained in annex I of document A/CN.9/577. The Commission took note of the summary of the deliberations on the draft convention since the thirty-ninth session of Working Group IV (Electronic Commerce) and the background information provided in document A/CN.9/577/Add.1. The Commission also took note of the comments on the draft convention that had been submitted by Governments and international organizations, as set out in document A/CN.9/578 and Add.1-17.

13. The Commission agreed to consider the draft preamble after it had settled the operative provisions of the draft convention.

B. General comments

14. It was noted that the draft convention aimed at removing legal obstacles to electronic commerce, including those which arose under other instruments, on the basis of well-established principles such as the principle of functional equivalence. However, the view was expressed that the normative content of the draft convention should be strengthened to enhance confidence in the use of electronic communications and contribute to curbing possible abuses and commercial fraud. In response, it was pointed out that the draft convention offered an effective set of legal rules that would facilitate economic development in all regions and countries at different stages of development.

15. The Commission was informed that many States were taking steps to broaden the use of electronic commerce and actively promote the modernization of business methods. It was observed that the draft convention would serve as a useful basis to allow States to simplify various domestic rules that applied to electronic commerce. The draft convention would further enhance confidence and trust in electronic commerce in cross-border trade.

C. Consideration of the draft convention

Article 1. Scope of application

16. The text of the draft article was as follows:

> "1. This Convention applies to the use of electronic communications in connection with the formation or performance of a contract [or agreement] between parties whose places of business are in different States.
>
> "2. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the

contract or from any dealings between the parties or from information disclosed by the parties at any time before or at the conclusion of the contract.

"3. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention."

17. The Commission agreed that, while considering draft article 1, it should bear in mind the logical relationship between draft articles 1, 18 and 19.

18. It was noted that, unlike other international instruments, such as the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)[2] (the "United Nations Sales Convention"), the draft convention applied to contracts between parties located in two different States, even if not both of them were contracting States. The view was expressed that, in its current form, draft article 1 gave the draft convention an excessively broad scope of application, which was unusual in international trade-related instruments. In particular, it was said that the current text of the draft convention would constitute an unfortunate precedent insofar as it allowed for the application of the convention to States that had not ratified or acceded to it, an approach that would ultimately infringe on State sovereignty.

19. In response, it was stated that no adverse effect on State sovereignty was involved. It was also pointed out that, even if draft article 1 differed from the United Nations Sales Convention, its definition of the scope of application was not entirely new and had been used, for example, in article 1 of the Uniform Law on the International Sale of Goods adopted by the Convention relating to a Uniform Law on the International Sale of Goods (The Hague, 1964).[3] Furthermore, it was noted that, as the draft convention contained rules of private law, it applied only to transactions between private parties and not to States. It was pointed out that nothing in the draft convention created any obligation for States that did not ratify or accede to the convention. It was added that the courts in a State that had not ratified the convention would apply its provisions only when that State's own rules of private international law indicated as applicable the law of a contracting State, in which case the convention would apply as part of that foreign State's legal system. The application of foreign law was a common result of any system of private international law and had been traditionally accepted by most States. The draft convention did not introduce any new element to that reality.

20. Nevertheless, it was recognized that the relationship between the rules of private international law and the draft convention's scope of application was not entirely clear. One possible interpretation was that, in its present form, the draft convention applied when the law of a contracting State was the law applicable to the dealings between the parties, which should be determined by the rules of private international law of the forum State, if the parties had not chosen the applicable law. With that understanding, the process for determining the applicability of the convention in any given case would be essentially as follows:

(a) If a party seized the court of a non-contracting State, the court would refer to the private international law rules of the State in which it was located and, if those rules designated the substantive law of any contracting State to the convention, the latter would apply as part of the substantive law of that State,

regardless of the fact that the State of the court seized was not a Party to the convention;

(b) If a party seized the court of a contracting State, the court would equally refer to the private international law rules of the State in which it was located and, if those rules designated the substantive law of that State or of any other State Party to the convention, the latter would be applied.

21. However, it was suggested that a different reading would be more appropriate in view of the interplay between draft article 1 and the declarations authorized by draft article 18. Draft article 1 could indeed be understood to the effect that, if the court seized was located in a contracting State, the court would have to apply the convention without regard to the rules of private international law, that is, whether or not the rules of private international law confirmed the application of the laws of the forum or directed to the laws of another State, similar to the "autonomous" application of the United Nations Sales Convention when the requirements of article 1, subparagraph 1 (a), of that Convention were met. If a contracting State wished to avoid having to apply the convention even in cases where the applicable law was that of a non-contracting State, it would have to make a declaration under article 18, subparagraph 1 (b), of the convention that it would apply it only "when the rules of private international law lead to the application of the law of a Contracting State". This interpretation, it was said, would seem to be justified by the need to give a meaningful purpose to the exclusion authorized by draft article 18, subparagraph 1 (b). Indeed, a declaration under that provision would be meaningless if the result it intended to achieve (i.e. to subject the application of the convention to the rules of private international law) was already implicit in draft article 1.

22. It was pointed out that both interpretations were possible in view of the current wording of draft article 1. Each of them had its own advantages and disadvantages. Making the convention applicable only if the rules of private international law of the forum led to its application was said to be more in line with the understanding of the Working Group concerning the relationship between the draft convention and the otherwise applicable law (see A/CN.9/571, para. 36). On the other hand, an autonomous scope of application would enhance legal certainty, as it allowed the parties to know beforehand when the convention applied. The prevailing view that emerged in the Commission's deliberations was that the convention should only apply when the laws of a contracting State applied to the underlying transaction. The Commission decided that no changes were therefore required in draft article 1, paragraph 1, but that a clarifying statement in explanatory notes to the text of the convention (see para. 165 below) (the "explanatory notes") would be useful and that adjustments might be needed in draft article 18 (see para. 127 below).

23. The Commission noted the proposal to insert the words "or agreement" in draft paragraph 1 so as to make it clear that the convention applied also to arbitration agreements as defined in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)[4] (the "New York Convention"). The Commission decided not to adopt the proposed language as it felt that the draft text was sufficiently clear on that point. The Commission asked the Secretariat to clarify the point in the explanatory notes by explicitly stating that the convention applied also to arbitration agreements as defined in the New York Convention.

24. Subject to that amendment, the Commission approved the substance of draft article 1 and referred the text to the drafting group.

Article 2. Exclusions

25. The text of the draft article was as follows:

> "1. This Convention does not apply to electronic communications relating to any of the following:
>
> "(a) Contracts concluded for personal, family or household purposes;
>
> "(b) (i) Transactions on a regulated exchange; (ii) foreign exchange transactions; (iii) inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments; (iv) the transfer of security rights in, sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary.
>
> "2. This Convention does not apply to bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money."

26. The Commission recalled that draft article 2 had already been extensively discussed at the Working Group (see A/CN.9/548, paras. 98-111, and A/CN.9/571, paras. 59-69). The Commission noted that subparagraph 1 (a) reflected the decision of the Working Group to exclude consumer contracts, whereas subparagraph 1 (b) excluded particular transactions in the financial service sector for the reason that that sector already contained well-defined rules and inclusion of such transactions within the scope of the draft convention could be disruptive to the operation of those rules.

27. It was further noted that paragraph 2 excluded negotiable instruments and similar documents because the potential consequences of unauthorized duplication of documents of title and negotiable instruments—and generally any transferable instrument that entitled the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money—made it necessary to develop mechanisms to ensure the singularity of those instruments. The Working Group had agreed that finding a solution for that problem required a combination of legal, technological and business solutions, which had not yet been fully developed and tested. For those reasons, the Working Group had agreed that the issues raised by negotiable instruments and similar documents, in particular the need for ensuring their uniqueness, went beyond simply ensuring the equivalence between paper and electronic form, which was the main aim of the draft convention and justified the exclusion provided in paragraph 2 of the draft article (see A/CN.9/571, para. 136).

28. It was proposed that the explanatory notes clarify that subparagraph 1 (a), which excluded "personal, family or household purposes", was not intended to be restricted to consumer matters but also covered matrimonial property contracts as governed by the Convention on the Law Applicable to Matrimonial Property Regimes (The Hague, 1978).[5] It was also proposed that an express exclusion be made in respect of contracts involving courts, public authorities or professions exercising public authority, such as notaries.

29. The suggestion was made that the explanatory notes should clarify the meaning of subparagraph 1 (a) of draft article 2. It was noted that a similar phrase in the context of the United Nations Sales Convention was understood as referring to consumer contracts. However, in the context of the draft convention, which had a broader scope of application and was not limited to electronic communications related to purchase transactions, the words in subparagraph 1 (a) could be given a broader interpretation, so as to exclude communications related to contracts governed by family law and the law of succession. In support of that suggestion, it was stated that, according to an understanding widely shared at the Working Group, it had always been assumed that the draft convention did not govern matters related to family law and the law of succession, and that the draft convention's focus on trade transactions was evidenced by the requirement, in draft article 1, that the parties had to have their "places of business" in contracting States. However, there were objections to taking up those suggestions at the current stage on the grounds that they might lead to reopening other matters that had been settled at the Working Group, when it had agreed to delete a large list of matters excluded from the scope of the draft convention. It was agreed that the explanatory notes should reflect the deliberations of the Working Group. Subparagraph 1 (a) of draft article 2 should not be understood in the narrow meaning given to a similar phrase in the context of the United Nations Sales Convention, which meant that the use of electronic communications in connection with contracts governed by family law or the law of succession was outside the scope of the draft convention.

30. The Commission approved the substance of draft article 2 and referred the text to the drafting group.

Article 3. Party autonomy

31. The text of the draft article was as follows:

> "The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions."

32. The Commission noted that two issues arose in connection with comments that had been submitted by Governments in respect of draft article 3. The first was whether or not derogation had to be made explicitly or could also be made implicitly, for example by parties agreeing to contract terms at variance with the provisions of the draft convention. Although some concern was expressed that implicit derogation could lead to uncertainty of application, the Commission agreed that derogation could be either explicit or implicit and that that aspect should be reflected in the explanatory notes.

33. The second issue concerned the question whether the scope of party autonomy should be restricted. For example, it was proposed that the parties not be able to derogate from articles 8 and 9, which set out the minimum conditions for meeting form requirements. It was submitted that unrestricted party autonomy could undermine the entire convention and could permit parties to derogate from mandatory national laws. A proposal was made that the scope of article 3 be limited to articles 10-14. However, there was strong support for the view that party autonomy was vital in contractual negotiations and should be recognized by the draft convention, although it was generally accepted that party autonomy did not extend to contracting out of otherwise mandatory national laws. On that basis, the

Commission agreed that the principle of party autonomy as expressed in draft article 3 should not be restricted and that aspect should be reflected in the explanatory notes.

34. The Commission approved the substance of draft article 3 and referred the text to the drafting group.

Article 4. Definitions

35. The text of the draft article was as follows:

"For the purposes of this Convention:

"(a) 'Communication' means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract;

"(b) 'Electronic communication' means any communication that the parties make by means of data messages;

"(c) 'Data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

"(d) 'Originator' of an electronic communication means a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication;

"(e) 'Addressee' of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication;

"(f) 'Information system' means a system for generating, sending, receiving, storing or otherwise processing data messages;

"(g) 'Automated message system' means a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a person each time an action is initiated or a response is generated by the system;

"(h) 'Place of business' means any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location."

36. The Commission noted that most of the definitions contained in draft article 4 were based on definitions used in the UNCITRAL Model Law on Electronic Commerce[6] and had been the subject of extensive discussion at the Working Group (see A/CN.9/527, paras. 111-122, A/CN.9/528, paras. 76 and 77, and A/CN.9/571, paras. 78-89).

37. The Commission heard a few suggestions for clarifying definitions or eliminating some of them, in particular the definition of "place of business" in subparagraph (h), which was said to interfere with established law. However, there was little support for amending the draft article, which the Commission approved in substance and referred to the drafting group. The Commission agreed that the definition of "place of business" was not intended to affect other substantive law relating to places of business, and that that understanding should be reflected in the explanatory notes (see also para. 90 below).

Article 5. Interpretation

38. The text of the draft article was as follows:

> "1. In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
>
> "2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

39. Noting that draft article 5 was a standard provision in UNCITRAL texts, the Commission approved the substance of draft article 5 and referred the text to the drafting group.

Article 6. Location of the parties

40. The text of the draft article was as follows:

> "1. For the purposes of this Convention, a party's place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location.
>
> "2. If a party has not indicated a place of business and has more than one place of business, then [, subject to paragraph 1 of this article,] the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.
>
> "3. If a natural person does not have a place of business, reference is to be made to the person's habitual residence.
>
> "4. A location is not a place of business merely because that is: (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (b) where the information system may be accessed by other parties.
>
> "5. The sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country."

41. The Commission recalled that there had been considerable debate on the draft provision during the preparation of the draft convention by the Working Group (see A/CN.9/509, paras. 61-65, and A/CN.9/546, paras. 88-105). The current text of the draft article merely created a presumption in favour of a party's indication of its place of business, which was accompanied by conditions under which that indication could be rebutted and default provisions that applied if no indication had been made. The draft article was not intended to allow parties to invent fictional places of business that did not meet the requirements of draft article 4, subparagraph (h).

42. Nevertheless, it was proposed that the draft convention include an obligation for a party to indicate its place of business and that not to do so could leave that aspect of the draft convention open to commercial fraud. It was suggested that such a positive obligation would enhance confidence in electronic commerce, support measures to curb illicit uses of electronic means of communications and facilitate determining the scope of application of the draft convention.

43. In response, it was noted that determining the scope of application of the draft convention was a matter dealt with by draft article 1 and that including a positive obligation in draft article 6 had no bearing on that question. It was further noted that earlier versions of the draft convention, which were inspired by article 5, paragraph 1, of Directive 2000/31/EC of the European Union (the "European Union Directive"),[7] had contemplated a positive duty for the parties to disclose their places of business or provide other information. The Working Group, however, after extensive debate had agreed to delete those provisions, mainly because they were felt to be regulatory in nature, ill-placed in a commercial law instrument, unduly intrusive and potentially harmful to certain existing business practices. Disclosure obligations such as those which had been contemplated by the draft article were typically found in legal texts that were primarily concerned with consumer protection, as was the case in the European Union Directive. In the context of the European Union, however, member States had their own regime for lack of compliance with disclosure obligations. It was recalled that the Working Group had agreed that inclusion of any such obligation would require inclusion of provisions setting out the consequences of failing to comply with such an obligation and the Working Group had agreed that that was outside the scope of the draft convention.

44. In view of those observations, the Commission approved the substance of paragraph 1 unchanged and referred the text to the drafting group.

45. It was noted that paragraph 2 was inspired by a similar provision contained in the United Nations Sales Convention and was based on the principle that if a party had more than one place of business, the party should be able to designate one place to be the place of business and, in the absence of such a designation, the place of business bearing the closest relationship to the contract should be taken to be the place of business. A proposal was made to delete the bracketed text in paragraph 2 and also delete the words "and has more than one place of business" for the reason that those words were unnecessary. The proposal to delete the bracketed text was supported. However, the words "and has more than one place of business" were retained. With that change, the Commission approved the substance of draft paragraph 2 and referred the text to the drafting group.

46. Clarification was sought as to whether paragraph 2 of the draft article also applied to cases where a party with several places of business had in fact indicated a place of business but that indication was rebutted under paragraph 1. In response, it was stated that the application of paragraph 2 of the draft article would be triggered by the absence of a valid indication of a place of business and that the default rule provided in that provision would apply not only in the event that a party failed to indicate its place of business, but also when such indication was rebutted under paragraph 1. It was agreed that the explanatory notes should contain an explanation to that effect.

47. The Commission approved the substance of paragraphs 3 and 4 of the draft article unchanged and referred the text to the drafting group. In respect of paragraph 5, it was suggested that, for purposes of technological neutrality, reference should also be made to the use of "other electronic means of communication", in addition to the expressions "domain name" and "electronic mail address", so as to include other commonly used media, such as, for example, a short message service (SMS). While the Commission was initially inclined to accept that suggestion, it was eventually agreed to retain the text of paragraph 5 of the draft article as it currently stood. It was observed that domain names and electronic mail addresses were not strictly speaking "means of communication" and that, therefore, the proposed addition would not fit well in the current draft paragraph. Furthermore, it was pointed out that the current text was concerned with existing technology in respect of which the Commission was of the view that they did not offer, in and of themselves, a sufficiently reliable connection to a country so as to authorize a presumption of a party's location. However, it would be unwise for the Commission, by using such a broad formulation, to rule out the possibility that new as yet undiscovered technologies might appropriately create a strong presumption as to a party's location in a country to which the technology used would be connected. Therefore, the Commission approved the substance of draft paragraph 5 unchanged and referred the text to the drafting group.

Article 7. Information requirements

48. The text of the draft article was as follows:

> "Nothing in this Convention affects the application of any rule of law that may require the parties to disclose their identities, places of business or other information, or relieves a party from the legal consequences of making inaccurate or false statements in that regard."

49. The Commission recalled that the text of draft article 7 was the result of extensive deliberations by the Working Group (A/CN.9/546, paras. 88-105, and A/CN.9/571, paras. 115 and 116). Having regard to the persisting objections within the Working Group to the addition of provisions whereby the parties would have a duty to disclose their places of business, the Working Group had agreed to address the matter from a different angle, namely by a provision that recognized the possible existence of disclosure requirements under the substantive law governing the contract and reminded the parties of their obligations to comply with such requirements. Nothing in the draft article allowed the parties to rely on fictitious places of business and thereby avoid other legal obligations.

50. A suggestion was made that the reference to "inaccurate or false" might not cover situations where there was an omission to make a statement that was required to be made under law. To address that situation it was proposed to add the term "incomplete" after the term "inaccurate". With that amendment, the Commission approved the substance of draft article 7 and referred the text to the drafting group.

Article 8. Legal recognition of electronic communications

51. The text of the draft article was as follows:

"1. A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.

"2. Nothing in this Convention requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct."

52. The Commission noted that paragraph 1 of draft article 8 embodied the principle of functional equivalence and was inspired by a similar provision contained in article 5 of the UNCITRAL Model Law on Electronic Commerce. It was noted that paragraph 2, while not similarly reflected in the Model Law, had been included in a number of national laws relating to electronic commerce to highlight the principle of party autonomy and recognize that parties were not obliged to use or accept electronic communications.

53. The Commission approved the substance of draft article 8 and referred the text to the drafting group.

Article 9. Form requirements

54. The text of the draft article was as follows:

"1. Nothing in this Convention requires a communication or a contract to be made or evidenced in any particular form.

"2. Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

"3. Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

"(a) A method is used to identify the party and to indicate that party's approval of the information contained in the electronic communication; and

"(b) That method is as reliable as appropriate to the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement.

"4. Where the law requires that a communication or a contract should be presented or retained in its original form, or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:

"(a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and

"(b) Where it is required that the information it contains be presented, that information is capable of being displayed to the person to whom it is to be presented.

"5. For the purposes of paragraph 4 (a):

"(a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and

"(b) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.

"[6. Paragraphs 4 and 5 do not apply where a rule of law or the agreement between the parties requires a party to present certain original documents for the purpose of claiming payment under a letter of credit, a bank guarantee or a similar instrument.]"

Paragraph 1

55. The Commission approved the substance of draft paragraph 1 and referred the text to the drafting group.

Paragraph 2

56. The view was expressed that the word "law" in paragraph 2 of the draft article could lead to confusion in certain legal systems and it was suggested that the text should instead refer to the "applicable law" or "applicable rules of law", as appropriate. It was noted that draft article 9 was based largely on the UNCITRAL Model Law on Electronic Commerce, which set out criteria to recognize the functional equivalence between data messages and paper documents. It was said, in that connection, that the use of the words "the law" in articles 6-8 of the UNCITRAL Model Law on Electronic Commerce did not give rise to difficulties, as the Model Law was intended to be incorporated into the legal system of enacting States and the meaning of the expression "the law" would in that context be clear. However, as one of the purposes of the draft convention was to remove possible obstacles to the use of electronic communications under existing international conventions and treaties, the words "the law" might not always be given a sufficiently broad interpretation so as to also cover legislative texts of an international origin.

57. Another suggestion was that the words "the law" might be understood as covering only the domestic law of the contracting States to the convention and not accepted trade practices and trade usages, which would be typically referred to by a broader term such as "rules of law". A better formulation, it was said, would be a phrase such as "the applicable international conventions, international trade rules and practices or the law". Alternatively, if the draft article only referred to the domestic law of a contracting State, the words "the applicable law" should be used.

58. In response, it was observed that the matter had already been considered by the Working Group, which had agreed to use the words "the law" essentially in the same sense in which those words had been used in the UNCITRAL Model Law on Electronic Commerce (see A/CN.9/571, para. 125). In the context of the draft article, the words "the law" were to be understood as encompassing not only statutory or regulatory law, including international conventions or treaties ratified by a contracting State, but also judicially created law and other procedural law. However, as used in the draft article, the words "the law" did not include areas of law that had not become part of the law of a State and were sometimes referred to by expressions such as "*lex mercatoria*" or "law merchant".

59. The Commission approved the substance of draft paragraph 2 and referred the text to the drafting group. The Commission asked the Secretariat to illustrate the intended meaning of the word "law" in paragraph 2 in the explanatory notes along the lines of what was indicated in paragraph 68 of the Guide to Enactment of UNCITRAL Model Law on Electronic Commerce.[6]

Paragraph 3

60. It was noted that paragraph 3 of the draft article was based on article 7 of the UNCITRAL Model Law on Electronic Commerce. However, it was suggested that paragraph 3 should instead be reformulated along the lines of article 6 of the UNCITRAL Model Law on Electronic Signatures,[8] which provided greater legal certainty by setting out more detailed standards for determining the reliability of an electronic signature. As there was not sufficient support for that proposal, the Commission confirmed the Working Group's preference for using the more general requirements in article 7 of the UNCITRAL Model Law on Electronic Commerce as a basis for the paragraph.

61. The view was expressed that the text of subparagraph 3 (a) did not provide for cases in which the signature was affixed to the message for the sole purpose of associating a party with an electronic communication, without any intended approval of the information contained therein, and for cases in which no content was associated with the signature. It was said, however, that there might be instances where the law required a signature, but that signature did not have the function of indicating the signing party's approval of the information contained in the electronic communication. For example, many States had requirements of law for notarization of a document by a notary or attestation by a commissioner for oath. In such cases, it was not the intention of the law to require the notary or commissioner, by signing, to indicate approval of the information contained in the electronic communication. In such cases, the signature of the notary or commissioner merely identified the notary or commissioner and associated the notary or commissioner with the contents of the document, but did not indicate the approval by the notary or commissioner of the information contained in the document. Similarly, there might be laws that required the execution of a document to be witnessed by witnesses, who might be required to append their signatures to that document. The signature of the witnesses merely identified them and associated the witnesses with the contents of the document witnessed, but did not indicate their approval of the information contained in the document.

62. It was suggested that subparagraph 3 (a) should therefore be amended to recognize that electronic signatures were sometimes required by law only for the

purpose of identifying the person who signed an electronic communication and associating the information with that person, but not necessarily to indicate that person's "approval" of the information contained in the electronic communication. To that end, it was proposed that the subparagraph be revised to read along the following lines:

> "(a) A method is used to identify the party and to associate that party with the information contained in the electronic communication, and as may be appropriate in relation to that legal requirement, to indicate that party's approval of the information contained in the electronic communication; and"

63. There was general agreement within the Commission that subparagraph 3 (a) should not be understood to the effect that an electronic signature always implied a party's approval of the entire content of the communication to which the signature was attached. The views differed, however, as to whether the proposed new text improved the understanding of the draft article, or, on the contrary, rendered the draft article unnecessarily complex. Furthermore, it was said that the act of assigning a document typically signified consent at least to part of the information contained in a document. As an alternative, it was suggested that paragraph 3 of the draft article could instead refer to a party's approval "of the information to which the signature related". However, that proposal, too, was criticized on the grounds that, in practice, signatures could be used for different purposes. For example, there could be a mere signature on a page without an accompanying text, such as a signature to express an acknowledgement of receipt of goods; even if signed in blank, such a signature might still be evidence of receipt.

64. After extensive debate, and having considered various alternative formulations, the Commission eventually agreed that the words "that party's approval of the information contained in the electronic communication" should be replaced with the words "that party's intention in respect of the information contained in the electronic communication".

65. Turning to subparagraph 3 (b), the Commission heard expressions of concern that under the present formulation of that provision the satisfaction by an electronic signature of a legal signature requirement depended on whether the signature method was appropriately reliable for the purpose of the electronic communication in the light of all the circumstances. As such a determination could only be made ex post by a court or other trier of fact, the parties to the electronic communication or contract would not be able to know with certainty in advance whether the electronic signature used would be upheld by a court or other trier of fact as "appropriately reliable" or whether it would be denied legal validity for not having met such requirement. Furthermore, subparagraph 3 (b) also meant that, even if there was no dispute about the identity of the person signing or the fact of signing (i.e. no dispute as to authenticity of the electronic signature), a court or trier of fact might still rule that the electronic signature was not appropriately reliable and therefore invalidate the entire contract. That result would be particularly unfortunate, as it would allow a party to a transaction in which a signature was required to try to escape its obligations by denying that its signature (or the other party's signature) was valid—not on the ground that the purported signer did not sign or that the document it signed had been altered, but only on the ground that the method of signature employed was not as reliable as appropriate in the circumstances. The language of the draft convention would thus permit a bad-faith undermining of the contract. It

was also mentioned that that problem would be more apparent in cases where third parties challenged a commercial transaction, as it might be the case where trustees in bankruptcy or regulatory and enforcement government entities were involved. For those reasons, it was suggested that draft article 9, subparagraph 3 (b), should be deleted.

66. In response, it was indicated that the identity requirement contained in draft article 9, subparagraph 3 (a), could be insufficient to ensure the correct interpretation of the principle of functional equivalence in electronic signatures, since the "reliability test" of subparagraph 3 (b), while indicating the minimum requirements for the validity of the signature, would also remind courts of the need to take into account factors other than technology, such as the purpose for which the electronic communication was generated or communicated, or a relevant agreement of the parties, in ascertaining the validity of the signature. Without subparagraph 3 (b), the courts in some States might be inclined to consider that only signature methods that employed high-level security devices were adequate to identify a party, despite an agreement of the parties to use simpler signature methods. It was further observed that the post facto judicial control over the validity of the signature was an element common to handwritten signatures, as was the risk of possible malicious challenges to the validity of the signature. It was also indicated that the reliability test that appeared in the UNCITRAL Model Law on Electronic Commerce had not given rise to particular problems in the jurisdictions where the Model Law had been enacted.

67. The Commission considered extensively the various views that had been expressed. There was strong support for retaining the "reliability test" contained in subparagraph 3 (b) of the draft article. However, the Commission was also sensitive to the arguments that had been made in favour of deleting that provision. There was general agreement that the draft convention should prevent the recourse to the "reliability test" in those cases when the actual identity of the party and its actual intention could be proved. After considering various proposals for additional language to achieve that result, the Commission eventually agreed to reformulate paragraph 3 of the draft article along the following lines:

> "3. Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:
>
> "(a) A method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication; and
>
> "(b) The method used is either:
>
> "(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
>
> "(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence."

68. The Commission approved the substance of the revised version of draft paragraph 3 and referred the text to the drafting group.

Paragraphs 4 and 5

69. It was observed that the word "presented" in paragraph 4 could be misleading, as the term as used in some jurisdictions had a narrow technical meaning, limited, for instance, to the law of negotiable instruments. The Commission thus decided to replace the word "presented" with the words "made available" in paragraph 4.

70. It was proposed that paragraphs 4 and 5 of draft article 9 be deleted because they did not satisfactorily address the question of the electronic equivalent of an original document. It was observed that the particular problem involved in creating an electronic equivalent for the transfer of a paper-based original was how to provide a guarantee of uniqueness equivalent to possession of the original of a document of title or negotiable instrument and that thus far it had not been possible to develop a wholly satisfactory solution to ensure this "singularity" or "originality". Under such circumstances, it was surprising that draft article 9, in paragraphs 4 and 5, should purport to define the electronic equivalent of an original when it did not make such equivalence subject to the requirement of singularity of the original, which was intrinsically linked to the very function and nature of an original. The provision would thus be unable to address the question of the transfer of a negotiable instrument. Paragraphs 4 and 5 should, therefore, be deleted or, at the very least, limited only to arbitration agreements. In response, it was noted that the Commission had decided to exclude documents of title and negotiable instruments from the scope of the convention in draft article 2, paragraph 2 (see paras. 25-30 above).

71. The Commission recalled that the Working Group had initially decided to include a provision on electronic equivalents of "original" documents in the draft convention in the light of its decision to add the New York Convention to the list of instruments in draft article 19, paragraph 1, because article IV, paragraph (1) (b), of the New York Convention required that the party seeking recognition and enforcement of a foreign arbitral award must submit, inter alia, an original or a duly certified copy of the arbitration agreement. At the same time, however, the Working Group had noted that, although draft paragraphs 4 and 5 had been inserted to address a particular problem raised by arbitration agreements, the usefulness of those provisions extended beyond that limited field in view of possible obstacles to electronic commerce that might result from various other requirements concerning original form. Despite differing views as to the appropriateness of that conclusion, the Working Group had not agreed to limit the scope of draft paragraphs 4 and 5 to arbitration agreements (A/CN.9/571, para. 132).

72. Another argument in support of retaining draft paragraphs 4 and 5 was that, whereas uniqueness was in fact an important condition for an effective system of negotiability in connection with transport documents or negotiable instruments, documents could retain their condition as "original" documents even if they were issued in several "original" copies. The essential requirement for all purposes other than transfer and negotiation of rights evidenced by or embodied in a document was the integrity of the document and not its uniqueness.

73. Having considered the views expressed, and noting that there was little support for deleting paragraphs 4 and 5 of the draft article, the Commission approved their substance, with the amendments it had accepted earlier, and referred them to the drafting group. The Commission noted, however, that, when it reached

draft article 18, it could consider whether that article gave States the possibility to exclude the application of paragraphs 4 and 5 of draft article 9.

Paragraph 6

74. The Commission noted that paragraph 6 appeared within square brackets because the Working Group had not been able, for lack of time, to complete its review at its forty-fourth session. As an alternative to the draft paragraph, it had been suggested that the draft convention could give States the possibility to exclude the application of paragraphs 4 and 5 of draft article 9 in respect of the documents referred to in paragraph 6 by declarations made under draft article 18 (A/CN.9/571, para. 138).

75. Questions were raised concerning the purpose of paragraph 6, which appeared to duplicate the exclusion contained in draft article 2, paragraph 2. In response, it was noted that paragraph 6 of draft article 9 related to documents and evidence that needed to be submitted in writing to substantiate claims for payments under a letter of credit or a bank guarantee, but not to the bank guarantee or letter of credit itself, which would not be excluded from the scope of the convention. It was pointed out that article 2, paragraph 2, was not intended to cover letters of credit or bank guarantees, since it was limited to "transferable" documents or instruments. It was, however, recognized that the explanatory notes should clarify the import of that exclusion.

76. There was some support for retaining paragraph 6 of draft article 9, in part for the comfort it provided to the issuers of and obligees under the instruments it referred to, and in part because it was felt that an outright exclusion under draft article 9 would better suit the purpose of attaining the broadest possible uniformity in the application of the convention than the alternative of corresponding exclusions at the national level by means of declarations under draft article 18, paragraph 2. The prevailing view, however, was that States that wished to facilitate the submission of electronic communications in support of payment claims under letters of credit and bank guarantees should not be deprived of that possibility by the existence of a general exclusion under paragraph 6 of draft article 9. Unilateral exclusions for those States which did not want to promote that possibility, however undesirable from the perspective of uniform law, would nevertheless be a better option than the current paragraph 6 of the draft article. The Commission therefore agreed to delete paragraph 6 of draft article 9.

Article 10. Time and place of dispatch and receipt of electronic communications

77. The text of the draft article was as follows:

> "1. The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.
>
> "2. The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic

communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

"3. An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6.

"4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article."

Paragraph 1

78. The Commission noted that paragraph 1 followed in principle the rule set out in article 15 of the UNCITRAL Model Law on Electronic Commerce, although it provided that the time of dispatch was when the electronic communication left an information system under the control of the originator rather than the time when the electronic communication entered an information system outside the control of the originator.

79. The Commission approved the substance of draft paragraph 1 and referred the text to the drafting group.

Paragraph 2

80. With respect to paragraph 2, a proposal was made that, in order to address the concerns raised by the increasing use of security filters (such as "spam" filters and other technologies restricting the receipt of problem electronic mail), the explanatory notes should clarify that the principle contained therein, namely that the time of receipt of an electronic communication was the time when it became capable of being retrieved by the addressee at an electronic address designated by the addressee, was a rebuttable presumption. This was supported by many delegations.

81. It was also proposed that the explanatory notes highlight that draft article 10 did not preclude sending electronic communications referring to information that was available to be retrieved by the receiver at a particular location, such as a web address. The concern was raised that the proposal could in effect lead to the creation of a technology-specific rule, especially given that, even in written communications, reference was often made to information that was contained in another separately available document, such as a record in a registry. While some support was expressed for that proposal, concerns were expressed that recognition of such practices by way of the explanatory notes might unwittingly raise the legal status of a posting of information on a website. It was noted that, as the text of the paragraph stood, it did not encompass notification of information contained in a website. It was suggested that a distinction ought to be drawn between a situation where an electronic communication referred to and included a link to a website containing further information relating to the electronic communication and a situation where

an electronic communication simply contained a link to a website. The first posting could be taken as forming part of the electronic communication based on the principle of incorporation by reference (as enunciated, for example, in article 5 bis of the Model Law on Electronic Commerce), but the second could not be taken to be included within the electronic communication. Following discussion, the Commission decided that there was no consensus to include the proposed clarification in the explanatory notes.

82. The suggestion was made that the condition for the presumption of receipt of electronic communications at a non-designated address created legal uncertainty, as it would be difficult for the originator to prove a subjective circumstance such as when the addressee had in fact become aware that the electronic communication had been sent to a particular non-designated address. It was therefore proposed that the second sentence of paragraph 2 be deleted and that paragraph 2 no longer distinguish between designated and non-designated electronic addresses. In response, it was stated that such awareness could be proven by other objective evidence. The Commission recalled that paragraph 2 was a provision that had been arrived at after extensive deliberation and that the current text represented a finely balanced compromise reached in the Working Group, which had acknowledged that many persons had more than one electronic address and could not be reasonably expected to anticipate receiving legally binding communications at all addresses they maintained. After discussion, the Commission approved the substance of draft paragraph 2 without change and referred the text to the drafting group.

Paragraph 3

83. It was proposed that the current wording of paragraph 3, which referred to a communication being "deemed to be received" at particular places should be a presumption, rebuttable by appropriate evidence. To achieve that, it was proposed to replace the word "deemed" with the word "presumed". It was said that that formulation was more consistent with other presumptions contained in the draft convention and also respected the principle of party autonomy. There was little support for that proposal. It was noted that the concern of the Working Group had been to avoid a duality of regimes for online and offline transactions and, taking the United Nations Sales Convention as a precedent, where the focus was on the actual place of business of the party, the reference to the term "deemed" had been chosen deliberately to avoid attaching legal significance to the use of a server in a particular jurisdiction that differed from the jurisdiction where the place of business was located simply because that was the place where an electronic communication had reached the information system where the addressee's electronic address was located.

84. The Commission approved the substance of draft article 10 and referred the text to the drafting group.

Article 11. Invitations to make offers

85. The text of the draft article was as follows:

> "A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders

through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance."

86. It was suggested that a new paragraph should be incorporated into draft article 11 to address unsolicited commercial communications ("spam"). While concern was expressed regarding the impact of "spam", the Commission agreed that it was not a matter that should be dealt with in the present text.

87. Clarification was sought as to the meaning of "interactive applications" and whether it was equivalent to the term "automated message system" as defined in article 4, subparagraph (g), of the draft convention. The Commission noted that the term "interactive applications" had been used in preference to "automated message system" as it was considered to provide an appropriately objective term that better described the situation that was apparent to any person accessing a system, namely, that it was prompted to exchange information through that system by means of immediate actions and responses having an appearance of automaticity (A/CN.9/546, para. 114).

88. The Commission approved the substance of draft article 11 and referred the text to the drafting group.

Article 12. Use of automated message systems for contract formation

89. The text of the draft article was as follows:

"A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed each of the individual actions carried out by the systems or the resulting contract."

90. It was suggested that the language in draft article 12 should be aligned with the language used in the definition of "automated message system" contained in draft article 4, subparagraph (g), of the draft convention in two respects. Firstly, it was proposed that the term "natural person" contained in draft article 12 should also be used in draft article 4, subparagraph (g). That proposal was agreed to by the Commission.

91. Secondly, it was proposed that the reference to "or intervention" contained in draft article 4, subparagraph (g), be repeated in draft article 12. That proposal was also agreed to.

92. The Commission approved the substance of draft article 12, as modified, and referred the text to the drafting group.

Article 13. Availability of contract terms

93. The text of the draft article was as follows:

"Nothing in this Convention affects the application of any rule of law that may require a party that negotiates some or all of the terms of a contract through the exchange of electronic communications to make available to the other party those electronic communications that contain the contractual terms

in a particular manner, or relieves a party from the legal consequences of its failure to do so."

94. Clarification was sought as to whether the reference to "any rule of law" should be aligned with language used elsewhere in the text, such as in draft article 9, paragraph 2, which referred to "the law". In response, the Commission took note that the use of the term "any rule of law" instead of "law" had been chosen because of the phrasing of particular paragraphs that did not lend themselves to inclusion of the term "law". The phrase "any rule of law" in the draft article had however the same meaning as the words "the law" in draft article 9 and encompassed statutory, regulatory and judicially created laws as well as procedural laws, but did not cover laws that had not become part of the law of the State, such as *lex mercatoria*, even though the expression "rules of law" was sometimes used in that broader meaning. The Commission approved the substance of draft article 13 and referred the text to the drafting group.

Article 14. Error in electronic communications

95. The text of the draft article was as follows:

"1. Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the electronic communication in which the input error was made if:

"(a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication;

"(b) The person, or the party on whose behalf that person was acting, takes reasonable steps, including steps that conform to the other party's instructions, to return the goods or services received, if any, as a result of the error or, if instructed to do so, to destroy the goods or services; and

"(c) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.

"2. Nothing in this article affects the application of any rule of law that may govern the consequences of any errors made during the formation or performance of the type of contract in question other than an input error that occurs in the circumstances referred to in paragraph 1."

Paragraph 1

96. Support was expressed for the principle that, except for the particular situation dealt with in the draft article, the conditions for withdrawal of electronic communications vitiated by error should be better left for domestic legislation, as they related to general principles of contract law and not to issues specific to electronic commerce.

97. The suggestion was made that the draft provision should contain an additional condition for withdrawal to the effect that the withdrawal of an electronic communication would only be possible when it could be assumed, in the light of all circumstances, that a reasonable person in the position of the originator would not have issued the electronic communication, had that person been aware of the error at that time. Such an addition, it was said, was justified by the need to ensure that the possibility of withdrawing an electronic communication would not be misused by parties acting in bad faith who wished to nullify what would otherwise be valid legal commitments accepted by them. There was little support for that proposal, as it was felt that it added a subjective element that would require a determination of the intent of the party who sent the allegedly erroneous message. It was pointed out that the draft article dealt with the allocation of risks concerning errors in electronic communications in a fair and sensible manner. An electronic communication could only be withdrawn if the automated message system did not provide the originator with an opportunity to correct the error before sending the message. If the operator of the automated message system failed to offer such means, despite the clear incentive to do so in the draft article, it was reasonable to make such party bear the risk of errors being made in electronic communications exchanged through the automated message system. Limiting the right of the party in error to withdraw the messages would not further the intended goal of the provision to encourage parties to provide for an error-correction method in automated message systems.

98. The view was expressed that the term "correct" should replace the term "withdraw", or, alternatively, that both terms should be used, for the reasons that had already been put forward during the deliberations of the Working Group (see A/CN.9/571, para. 193). There were objections to that proposal for the following reasons: (a) the typical consequence of an error in most legal systems was to make it possible for the party in error to avoid the effect of the transaction resulting from its error, but not necessarily to restore the original intent and enter into a new transaction; (b) withdrawal equated to nullification of a communication, while correction required the possibility to modify the previous communication (a provision mandating the right to correct would introduce additional costs for system providers and give remedies with no parallel in the paper world, a result that the Working Group had previously agreed to avoid); and (c) the proposed amendment might cause practical difficulties, as operators of automated message systems might more readily provide an opportunity to nullify a communication already recorded than an opportunity to correct errors after a transaction was concluded. It was further indicated that a right to correct errors might entail that an offeror who received an electronic communication later alleged to contain errors must keep its original offer open since the other party had effectively replaced the communication withdrawn.

99. It was observed that draft article 14, paragraph 1, required the withdrawal of the entire communication also when the error vitiated only a part of the electronic communication. It was indicated that the right to withdraw should not affect those portions of a message not vitiated by the error. It was added that the provision for a partial withdrawal would also assist in preventing abuses in the exercise of the right to withdraw.

100. After discussion, the Commission decided to add the words "the portion of" between the words "the right to withdraw" and the words "the electronic

communication" in draft article 14, paragraph 1, of the draft convention. The Commission requested the Secretariat to clarify in the explanatory notes how the withdrawal of a portion of the electronic communication might affect the validity of the whole message. The Commission approved the substance of the *chapeau* and subparagraph 1 (a) of draft paragraph 1 and referred the text to the drafting group.

Subparagraph (b)

101. It was suggested that subparagraph (b) should be deleted, since it related to the consequences of the error, which should be left for national law to determine, and not with the conditions for the exercise of the right of withdrawal. After discussion, the Commission decided to delete subparagraph (b) of paragraph 1.

Subparagraph (c)

102. It was also suggested that subparagraph (c) should be deleted, for the same reasons as for subparagraph (b) in the same draft article (see para. 101 above). However, the contrary view was also expressed, that draft subparagraph (c) related to the conditions for the exercise of the right of withdrawal. It was added that the rationale of the draft provision was to bar withdrawal when the party making an error had already received material benefits or value from the vitiated communication. The Commission decided to retain subparagraph (c) paragraph 1 and referred the text to the drafting group.

Paragraph 1: time limit

103. It was indicated that the draft convention should contain a provision indicating a time limit of two years to exercise the right of withdrawal in case of input error. It was observed that such time limit would give certainty to legal transactions, which would otherwise indefinitely be subject to withdrawal until discovery of the error. In response, it was indicated that time limits were a matter of public policy in many legal systems and that the draft convention should not deal with them. It was added that the combined impact of subparagraphs (a) and (c) already resulted in limiting the time within which an electronic communication could be withdrawn, since indeed withdrawal had to occur "as soon as possible", but in any event not later than the time when the party had used or received any material benefit or value from the goods or services received from the other party. After discussion, the Commission decided not to insert a time limit to exercise the right of withdrawal in case of input error.

Paragraph 2

104. It was submitted that the underlying purpose of draft article 14 was to provide that the specific remedy provided for in respect of input errors was not intended to interfere with the general doctrine on error that existed in national laws. To better express that purpose it was proposed that paragraph 2 be amended to delete the words "in question other than an input error that occurs in the circumstances referred to" and substitute wording along the following lines: "on grounds or for purposes other than providing a special remedy for input errors having occurred in the circumstances referred to in paragraph 1". There was support for that proposal, although it was suggested that the amended words should be shortened to simply provide "other than as provided for in paragraph 1". Another suggestion was made

to delete the words "made during the formation or performance of the type of contract in question" since those words were unnecessary given the reference to paragraph 1. That proposal was accepted. A proposal to include a reference to "special remedy" in paragraph 2 did not receive support. The Commission agreed to amend paragraph 2 along the following lines: "Nothing in this article affects the application of any rule of law that may govern the consequences of any errors other than as provided for in paragraph 1." The Commission approved the substance of draft paragraph 2, as revised, and referred the text to the drafting group.

General remarks on the final provisions

105. The Commission noted that draft articles 15-21, 22, variant A, 23 and 25 had already appeared in the last version of the draft convention considered by the Working Group. Draft articles 16 bis, 19 bis, 22, variant B, and 24 reflected proposals for additional provisions that had been made at the forty-fourth session of the Working Group. At that time, the Working Group had considered and approved draft articles 18 and 19 and had held an initial exchange of views on the other final clauses, which, for lack of time, the Working Group had not formally approved. In the light of its deliberations on chapters I, II and III and draft articles 18 and 19, the Working Group had requested the Secretariat to make consequential changes in the draft final provisions in chapter IV, as contained in the version of the draft convention considered by the Working Group. The Working Group had also requested the Secretariat to insert within square brackets in the final draft to be submitted to the Commission the draft additional provisions that had been proposed during its forty-fourth session (A/CN.9/571, para. 10).

Article 15. Depositary

106. The text of the draft article was as follows:

> "The Secretary-General of the United Nations is hereby designated as the depositary for this Convention."

107. No comments were made on the draft article, which the Commission approved in substance and referred to the drafting group.

Article 16. Signature, ratification, acceptance or approval

108. The text of the draft article was as follows:

> "1. This Convention is open for signature by all States [at [...] from [...] to [...] and thereafter] at the United Nations Headquarters in New York from [...] to [...].
>
> "2. This Convention is subject to ratification, acceptance or approval by the signatory States.
>
> "3. This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.
>
> "4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations."

109. The Commission noted that, in the absence of concrete proposals for convening a diplomatic conference to adopt the draft convention, no

recommendation for convening such a conference would be made to the General Assembly. The Commission therefore agreed to delete the first set of words within square brackets. As regards the period during which the convention should be open for signature, the Commission agreed that States should have the possibility to sign the convention for a period of two years after its adoption by the Assembly. The Commission requested the Secretariat to consider the possibility of organizing a special ceremony to give States the possibility of signing the convention, possibly during the Commission's thirty-ninth session, in 2006, as recent experience had demonstrated the usefulness of signing ceremonies for the purpose of promoting signature of newly adopted international conventions.

110. The Commission approved the substance of the draft article, as amended, and referred the text to the drafting group.

Article 16 bis. Participation by regional economic integration organizations

111. The text of the draft article was as follows:

> "[1. A Regional Economic Integration Organization which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The Regional Economic Integration Organization shall in that case have the rights and obligations of a Contracting State, to the extent that that Organization has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the Regional Economic Integration Organization shall not count as a Contracting State in addition to its Member States which are Contracting States.
>
> "[2. The Regional Economic Integration Organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that Organization by its Member States. The Regional Economic Integration Organization shall promptly notify the Depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.
>
> "[3. Any reference to a 'Contracting State' or 'Contracting States' or 'State Party' or 'States Parties' in this Convention applies equally to a Regional Economic Integration Organization where the context so requires.]"

112. The Commission noted that the draft article reflected a proposal that had been made at the forty-fourth session of the Working Group. There was strong support for retaining the draft article, as it was felt that such a provision, which also appeared in other recent international conventions in the field of international commercial law, such as the Unidroit Convention on International Interests in Mobile Equipment (Cape Town, 2001)[9] (the "Cape Town Convention"), would facilitate wider participation in the convention. Nevertheless, a number of questions were raised concerning the formulation of the draft article.

113. There was no support for the proposal to broaden the draft article so as to cover international organizations generally and not only regional economic integration organizations. It was noted that, at the current stage, most international

organizations did not have the power to enact legally binding rules having a direct effect on private contracts, since that function typically required the exercise of certain attributes of state sovereignty that only few regional economic integration organizations had received from their member States. However, some delegations stated that, in their view, the draft article should not be considered as excluding such international organizations that did have the necessary competence.

114. The suggestion was made that the draft article should only permit ratification by a regional economic integration organization when its member States had expressly authorized the organization to ratify the convention. It was also said that a regional economic integration organization should not have the right to ratify the convention if none of its member States had decided to do so. In response, it was observed that the extent of powers given to a regional economic integration organization was an internal matter concerning the relations between the organization and its own member States. The draft article, it was agreed, should not prescribe the manner in which regional economic integration organizations and their member States divided competences and powers among themselves.

115. As regards the phrase "has competence over certain matters governed by this Convention" in paragraph 1, the view was expressed that ratification or accession by a regional economic integration organization should only be possible to the extent that the organization in question had competence over all the matters covered by the draft convention. Another concern, in that connection, related to the interplay between draft articles 16 bis and 18. The question was asked whether a regional economic integration organization could submit declarations that differed from the declarations submitted by its member States. Such a situation was said to be highly undesirable, as it would create considerable uncertainty in the application of the convention and deprive private parties of the ability to easily ascertain beforehand to which matters the convention applied in respect of which States. Clarification was also sought concerning matters in which a regional economic integration organization might share competence with its member States and how private parties in third countries might know when the member States and when the organization had the power to make a declaration.

116. In response, it was observed that regional economic integration organizations typically derived their powers from their member States and that by their very nature, as international organizations, they only had competences in the areas that had been expressly or implicitly transferred to their sphere of activities. Several provisions of the draft convention, in particular those of chapter IV, implied the exercise of full state sovereignty and the draft convention was not in its entirety capable of being applied by a regional economic integration organization. Furthermore, the legislative authority over the substantive matters dealt with in the draft convention might to some extent be shared between the organization and its member States. The draft article would not provide a basis for ratification if the regional economic integration organization had no competence on the subject matter covered by the convention, but in cases where the organization had some competence, the draft article was a useful provision.

117. As regards the declarations that a regional economic integration organization and its member States might submit, it was suggested that, in practice, it was unlikely that conflicting declarations might be submitted by the organization and its member States. Paragraph 2 of the draft article already required a high standard of

coordination by requiring that the regional economic integration organization declare the specific matters for which it was competent. Under normal circumstances, careful consultations would take place, as a result of which, if declarations under draft article 18 were found to be necessary, there would be a set of common declarations for the matters in respect of which the regional economic integration organization was competent, which would be mandatory for all member States of the organization. Differing declarations from member States would thus be limited to matters in which no exclusive competence had been transferred from member States to the regional economic integration organization, or matters particular to the State making a declaration, as might be the case, for example, of declarations under draft article 19, paragraphs 2-4, since not all member States of regional economic integration organizations were necessarily contracting States to the same international conventions or treaties.

118. The Commission took note of those comments. There was general agreement on the paramount need for ensuring consistency between declarations made by regional economic integration organizations and declarations made by their member States. The Commission acknowledged, that, in view of the flexibility needed to take into account the peculiarities of regional economic integration organizations, it would not be possible to formulate provisions in the draft convention that effectively eliminated the risk, at least in theory, of a regional economic integration organization and its member States making conflicting declarations. Nevertheless, there was a strong consensus within the Commission that contracting States to the convention would be entitled to expect that a regional economic integration organization that ratified the convention, and its own member States, would take the necessary steps to avoid conflicts in the manner in which they applied the convention.

119. It was said that some regional economic integration organizations had the power to enact rules aimed at harmonizing private commercial law with a view to facilitating the establishment of an internal market among its member States. Those cases were analogous to the situation in some countries in which sub-sovereign jurisdictions, such as states or provinces, had legislative authority over private law matters. Therefore, for matters subject to regional legal harmonization, a regional economic integration organization showed some features of a domestic legal system and deserved similar treatment. For those reasons, it was proposed that a new paragraph should be added to the draft article to the effect that, in their mutual relations, contracting States to the convention should apply the rules emanating from the regional economic integration organization, rather than the provisions of the convention.

120. While there were several expressions of support for the proposed new provision, there were also strong objections to it. The main reason for those widely shared objections was that it would be inappropriate for an instrument prepared by the United Nations to prescribe to member States of regional economic integration organizations what rules they should apply as a result of their membership in such an organization. It was noted that other instruments prepared by the Commission, such as the United Nations Sales Convention, acknowledged the right of States with similar laws in respect of matters covered by the instrument to declare that their domestic laws took precedence over the provisions of the international instrument in respect of contracts concluded between parties located in their territories. It would

not be acceptable, however, for the international convention itself to dictate how States had to apply their domestic laws or regional commitments.

121. The Commission considered the proposal and its supporting arguments extensively, as well as alternative provisions that were suggested to meet the concerns of those who had raised objections to it. The Commission eventually agreed that a new paragraph 4 should be inserted in the draft article with wording along the following lines:

> "This Convention shall not prevail over any conflicting rules of any regional economic integration organization as applicable to parties whose respective places of business are located in Member States of any such organization, as set out by declaration made in accordance with article 20."

122. In response to questions raised in connection with the new provision, it was observed that the declaration contemplated therein would be submitted by the regional economic integration organization itself and was distinct from, and without prejudice to, declarations by States under draft article 18, paragraph 2. If no such organization ratified the convention, their member States who wished to do so would still have the right to include, among the other declarations that they might wish to make, a declaration of the type contemplated in the new paragraph 4 of the draft article in view of the broad scope of draft article 18, paragraph 2. It was understood that if a State did not make such a declaration, paragraph 4 of the draft article would not automatically apply.

123. The Commission approved the substance of the draft article, with the addition it had accepted, and referred the text to the drafting group.

Article 17. Effects in domestic territorial units

124. The text of the draft article was as follows:

> "1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.
>
> "2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.
>
> "3. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.
>
> "4. If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State."

125. The Commission noted that the draft article reflected the wording of similar provisions in other instruments it had prepared. However, the words "according to its constitution", which had appeared after the words "two or more territorial units

in which", had been deleted in other instruments. The Commission took note of those new practices, approved the substance of draft article 17 unchanged and referred the text to the drafting group.

Article 18. Declarations on the scope of application

126. The text of the draft article was as follows:

> "1. Any State may declare, in accordance with article 20, that it will apply this Convention only:
>
> "(a) When the States referred to in article 1, paragraph 1 are Contracting States to this Convention;
>
> "(b) When the rules of private international law lead to the application of the law of a Contracting State; or
>
> "(c) When the parties have agreed that it applies.
>
> "2. Any State may exclude from the scope of application of this Convention the matters it specifies in a declaration made in accordance with article 20."

127. The Commission agreed that the provision contained in draft article 18, paragraph 1 (b), should be deleted to reflect the understanding of the Commission that the application of the convention would in any event be subject to the rules of private international law and that, therefore, paragraph 1 (b) was redundant (see paras. 21 and 22 above).

128. It was suggested that the provision contained in draft article 18, paragraph 1 (c), should be deleted as it would give rise to significant uncertainties on the application of the convention in non-party States whose rules of private international law directed the courts to the application of the laws of a contracting State that had made such a declaration. Furthermore, it was argued that any declaration under draft article 18, paragraph 1 (c), would, in practice, radically restrict the applicability of the convention and deprive it of its primary function, which was to provide default rules for the use of electronic communications by parties that had not agreed on detailed contract rules for the matters covered by the draft convention. However, it was also observed that the provision would give those States which might have difficulties in accepting the general application of the convention under its article 1, paragraph 1, the possibility to allow their nationals to choose the convention as applicable law. The Commission agreed to retain the draft provision.

129. The question was raised as to whether draft article 18, paragraph 2, allowed States to make a declaration whereby the application of the convention would be limited only to the use of electronic communications in connection with contracts covered by some of the international conventions listed in draft article 19, paragraph 1, for example, to the New York Convention and to the United Nations Sales Convention, to the extent that the State making such a declaration was bound by those Conventions. The Commission agreed that under the broad terms of draft article 18, paragraph 2, such a declaration would be possible. However, it was also noted that, while any form of participation in the convention would contribute to the development of the use of electronic commerce in international trade, such a

declaration would not further the equally desired goal of ensuring the broadest possible application of the convention and should not be encouraged.

130. The Commission approved the substance of the draft article, as amended, and referred the text to the drafting group.

Article 19. Communications exchanged under other international conventions

131. The text of the draft article was as follows:

"1. The provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract or agreement to which any of the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958);

Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980);

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980);

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 19 April 1991);

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995);

United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001).

"2. The provisions of this Convention apply further to electronic communications in connection with the formation or performance of a contract or agreement to which another international convention, treaty or agreement not specifically referred to in paragraph 1 of this article, and to which a Contracting State to this Convention is or may become a Contracting State, applies, unless the State has declared, in accordance with article 20, that it will not be bound by this paragraph.

"3. A State that makes a declaration pursuant to paragraph 2 of this article may also declare that it will nevertheless apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of any contract or agreement to which a specified international convention, treaty or agreement applies to which the State is or may become a Contracting State.

"4. Any State may declare that it will not apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of a contract or agreement to which any international convention, treaty or agreement specified in that State's declaration, to which the State is or may become a Contracting State, applies, including any of the conventions referred to in paragraph 1 of this article, even

if such State has not excluded the application of paragraph 2 of this article by a declaration made in accordance with article 20."

132. Noting the extensive deliberations held on the draft article in the Working Group (A/CN.9/571, paras. 47-58), the Commission approved its substance and referred the text to the drafting group.

Article 19 bis. Procedure for amendments to article 19, paragraph 1

133. The text of the draft article was as follows:

"[1. The list of instruments in article 19, paragraph 1, may be amended by the addition of [other conventions prepared by UNCITRAL] [relevant conventions, treaties or agreements] that are open to the participation of all States.

"2. After the entry into force of this Convention, any State Party may propose such an amendment. Any proposal for an amendment shall be communicated to the depositary in written form. The depositary shall notify proposals that meet the requirements of paragraph 1 to all States Parties and seek their views on whether the proposed amendment should be adopted.

"3. The proposed amendment shall be deemed adopted unless one third of the States Parties object to it by a written notification not later than 180 days after its circulation.]"

134. The Commission noted that the entire draft article appeared within square brackets, as it reflected a proposal that had been made at the forty-fourth session of the Working Group but that the Working Group had not had time to consider.

135. It was observed that the draft provision would further the application of the convention to other UNCITRAL instruments, whose implementation was particularly favoured in view of their origin, as reflected in the text of draft article 19. In response, concerns were raised on the mechanism of tacit acceptance of the amendments envisaged in draft paragraph 3, insofar as this would bind States that did not explicitly express their consent to be bound by the amendment. It was added that, in the absence of a dedicated provision, the amendment of the relevant article would be possible according to the general rules applicable to the convention.

136. After discussion, the Commission decided to delete draft article 19 bis from the text of the draft convention.

Article 20. Procedure and effects of declarations

137. The text of the draft article was as follows:

"1. Declarations under articles 17, paragraph 1, 18, paragraphs 1 and 2 and 19, paragraphs 2, 3 and 4, may be made at any time. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

"2. Declarations and their confirmations are to be in writing and be formally notified to the depositary.

"3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

"4. Any State which makes a declaration under this Convention may modify or withdraw it at any time by a formal notification in writing addressed to the depositary. The modification or withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary."

138. The Commission agreed that the reference to draft article 17, paragraph 1, should be deleted from draft article 20, paragraph 1, since the declaration contained in draft article 17, paragraph 1, was typically made upon expression of consent to be bound by the State, as stated in the same draft provision.

139. The Commission agreed that a reference to draft article 16 bis, paragraph 4, should be inserted in draft article 20, paragraph 1. It was suggested that, unlike the declaration provided for in draft article 16 bis, paragraph 2, which was typically made upon expression of participation by the regional economic integration organization, the declaration in draft article 16 bis, paragraph 4, could be made at any time.

140. It was further suggested that declarations lodged after the entry into force of the convention should enter into force three months after the date of receipt by depositary, as provided for in other international trade law agreements. However, it was also noted that three months might not be adequate time to allow for adjustment in certain business practices and that for this purpose the period of six months should be retained.

141. Subject to those amendments, the Commission approved the substance of the draft article and referred the text to the drafting group.

Article 21. Reservations

142. The text of the draft article was as follows:

"No reservations may be made under this Convention."

143. Having noted the Working Group's understanding as to the practical difference between declarations and reservations in the context of the draft convention (see A/CN.9/571, para. 30), the Commission approved the substance of the draft article and referred the text to the drafting group.

Article 22. Amendments

144. The text of the draft article was as follows:

"[Variant A

"1. Any Contracting State may propose amendments to this Convention. Proposed amendments shall be submitted in writing to the Secretary-General of the United Nations, who shall circulate the proposal to all States Parties, with the request that they indicate whether they favour a

conference of States Parties. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Proposals for amendment shall be circulated to the Contracting States at least ninety days in advance of the conference.

"2. Amendments to this Convention shall be adopted by [two thirds] [a majority of] the Contracting States present and voting at the conference of Contracting States and shall enter into force in respect of States which have ratified, accepted or approved such amendment on the first day of the month following the expiration of six months after the date on which [two thirds] of the Contracting States as of the time of the adoption of the amendment at the conference of the Contracting States have deposited their instruments of acceptance of the amendment.]

"[Variant B

"1. The [Office of Legal Affairs of the United Nations] [secretariat of the United Nations Commission on International Trade Law] shall prepare reports [yearly or] at such [other] time as the circumstances may require for the States Parties as to the manner in which the international regimen established in this Convention has operated in practice.

"2. At the request of [not less than twenty-five per cent of] the States Parties, review conferences of Contracting States shall be convened from time to time by the [Office of Legal Affairs of the United Nations] [secretariat of the United Nations Commission on International Trade Law] to consider:

"(a) The practical operation of this Convention and its effectiveness in facilitating electronic commerce covered by its terms;

"(b) The judicial interpretation given to, and the application made of, the terms of this Convention; and

"(c) Whether any modifications to this Convention are desirable.

"3. Any amendment to this Convention shall be approved by at least a two-thirds majority of States participating in the conference referred to in the preceding paragraph and shall then enter into force in respect of States which have ratified, accepted or approved such amendment when ratified, accepted, or approved by three States in accordance with the provisions of article 23 relating to its entry into force.]"

145. The Commission noted that variant A of the draft article had already appeared in the last version of the draft convention that the Working Group had reviewed, whereas variant B reflected a proposal which had been made at the forty-fourth session of the Working Group, and which the Working Group had not had the time to consider. The Commission was advised that variant B presented a more flexible means for assessing the needs for amendment of the draft convention. The Commission was also advised that the references to the "Office of Legal Affairs of the United Nations" and the "secretariat of the United Nations Commission on International Trade Law" might need to be replaced with references to the "Secretary-General of the United Nations" or "the depositary" for consistency with

the practices in respect of administrative services provided by the United Nations to its Member States.

146. While some support was expressed for variant A, the prevailing view of the Commission was to adopt variant B as a working assumption. There was strong support for the idea of requesting the Secretariat to keep the practical application of the convention under review and to report to Member States, from time to time, as to problems or new developments that might warrant a revision of the convention. There was also support for envisaging a simplified amendment procedure that might obviate the need for convening ad hoc diplomatic conferences and that might take advantage of the existing framework offered by the Commission, its Working Groups and the Secretariat for the purpose of considering proposals for revision of the convention. However, there was considerable disagreement as to the level of detail with which those objectives should be reflected in the draft convention and to the extent to which the draft convention should deal with amendment procedures. In particular, there were strong objections to making express reference in the draft convention to an amendment procedure requiring formal voting by contracting States, as it was suggested that the practice of taking decisions by consensus, which the Commission had consistently applied throughout the years, was more appropriate for the formulation of uniform rules on private law matters.

147. It was stated that the Commission could propose changes by a protocol or otherwise through its procedures and that contracting States could still modify provisions at any time inter se under existing treaty law. It was also noted that most conventions that the Commission had prepared did not contain provisions on their amendment. In the absence of any provision relating to amendment of the draft convention, the principles for amendment of the draft convention would be found by reference to the Vienna Convention on the Law of Treaties[10] between States that were party to that Convention and principles of customary international law. After extensive debate on those conflicting views and having considered various proposals to address the concerns that had been expressed, the Commission decided to delete draft article 22.

Article 23. Entry into force

148. The text of the draft article was as follows:

> "1. This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the [...] instrument of ratification, acceptance, approval or accession.
>
> "2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the [...] instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession."

149. The Commission noted that existing UNCITRAL conventions required as few as three and as many as 10 ratifications for entry into force. A proposal was made that the number of ratifications to be included in the draft article should be 20. However, the Commission did not accept that proposal, as the prevailing view was in favour of entry into force after ratification of three States. It was noted that that

approach was in keeping with the modern trend in commercial law conventions, which promoted their application as early as possible to those States which sought to apply such rules to their commerce.

150. The Commission agreed to include the words "the third" in the open bracketed text in paragraphs 1 and 2. The Commission approved the substance of the draft article and referred the text to the drafting group.

Article 24. Transitional rules

151. The text of the draft article was as follows:

> "[1. This Convention applies only to electronic communications that are made after the date when the Convention enters into force.
>
> "[2. In Contracting States that make a declaration under article 18, paragraph 1, this Convention applies only to electronic communications that are made after the date when the Convention enters into force in respect of the Contracting States referred to in paragraph 1 (a) or the Contracting State referred to in paragraph 1 (b) of article 18.
>
> "[3. This Convention applies only to the electronic communications referred to in article 19, paragraph 1, after the date when the relevant Convention among those listed in article 19, paragraph 1, has entered into force in the Contracting State.
>
> "[4. When a Contracting State has made a declaration under article 19, paragraph 3, this Convention applies only to electronic communications in connection with the formation or performance of a contract falling within the scope of the declaration after the date when the declaration takes effect in accordance with article 20, paragraph 3 or 4.
>
> "[5. A declaration under article 18, paragraphs 1 or 2, or article 19, paragraphs 2, 3 or 4, or its withdrawal or modification, does not affect any rights created by electronic communications made before the date when the declaration takes effect in accordance with article 20, paragraph 3 or 4.]"

152. The Commission noted that the last version of the draft convention that the Working Group had considered had contained only paragraph 1 of the draft article. In its current form, the draft article reflected a proposal that had been made at the forty-fourth session of the Working Group.

153. Some support was expressed for inclusion of a provision in the draft convention to ensure that the convention only applied prospectively. However, clarification was sought as to whether what was intended to be covered by the words "when the Convention enters into force" was when the convention entered into force generally or when it entered into force in respect of the contracting State in question. It was noted that, if it was intended to refer to the time when the convention entered into force generally, that could have the effect of giving retrospective application in respect of States that became party to the convention thereafter. To address that ambiguity, it was agreed to include a reference to "in respect of each Contracting State" in paragraph 1.

154. It was proposed that paragraphs 2-5 of the draft article be deleted because they were unnecessarily complex and detailed. It was suggested that the issues dealt with

therein might be more appropriately addressed by the general rule set out in paragraph 1, which could be extended to refer also to declarations. The Commission agreed to that proposal.

155. The Commission agreed to amend the draft article to read as follows:

"This Convention and any declaration apply only to electronic communications that are made after the date when the Convention or the declaration enters into force or takes effect in respect of each Contracting State."

The Commission also agreed to change the title of the draft article to "Time of application". The Commission approved the substance of the draft article, as amended, and referred the text to the drafting group.

Article 25. Denunciations

156. The text of the draft article was as follows:

"1. A Contracting State may denounce this Convention by a formal notification in writing addressed to the depositary.

"2. The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary."

157. The Commission approved the substance of the draft article and referred the text to the drafting group.

Signature clause

158. The text of the draft signature clause was as follows:

"DONE at [...], this [...] day of [...], [...], in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

"IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention."

159. The Commission approved the substance of the draft signature clause and referred the text to the drafting group.

Preamble

160. The text of the draft preamble was as follows:

"*The States Parties to this Convention*,

"*Reaffirming* their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

"*Noting* that the increased use of electronic communications improves the efficiency of commercial activities, enhances trade connections and allows

new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

"*Considering* that problems created by uncertainty as to the legal value of the use of electronic communications in international contracts constitute an obstacle to international trade,

"*Convinced* that the adoption of uniform rules to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, would enhance legal certainty and commercial predictability for international contracts and may help States gain access to modern trade routes,

"*Being of the opinion* that uniform rules should respect the freedom of parties to choose appropriate media and technologies, [taking account of their interchangeability,] to the extent that the means chosen by the parties comply with the purpose of the relevant rules of law,

"*Desiring* to provide a common solution to remove legal obstacles to the use of electronic communications in a manner acceptable to States with different legal, social and economic systems,

"*Have agreed as follows:*"

161. It was suggested that the draft preamble was too long and could be shortened to indicate only the two main objectives envisaged in the draft convention, namely the encouragement of the use of electronic communications in international trade and the creation of the conditions required to establish confidence in electronic communications. In response, it was observed that the length and content of the draft preamble were generally in line with previous UNCITRAL instruments. It was added that the current draft of the preamble highlighted the relationship between the draft convention and the broader regulatory framework for electronic commerce.

162. The Commission decided that the bracketed language contained in paragraph 5 of the draft preamble should be replaced with the words "taking into account of principles of technological neutrality and functional equivalence".

163. Subject to those amendments, the Commission approved the substance of the draft preamble and referred the text to the drafting group.

Title of the convention

164. Noting that the title of the draft convention, "Convention on the Use of Electronic Communications in International Contracts" reflected accurately the scope of application of the convention, the Commission approved the title.

D. Explanatory notes

165. The Commission asked the Secretariat to prepare the explanatory notes to the text of the convention and, after their completion, to present those notes to the Commission at its thirty-ninth session, in 2006.

E. Report of the drafting group

166. The Commission requested a drafting group established by the Secretariat to review the draft convention, with a view to ensuring consistency between the various language versions. At the close of its deliberations on the draft convention, the Commission considered the report of the drafting group and approved the draft convention. The Commission requested the Secretariat to review the text of the draft convention from a purely linguistic and editorial point of view before its adoption by the General Assembly.

F. Decision of the Commission and recommendation to the General Assembly

167. At its 810th meeting, on 15 July 2005, the Commission adopted by consensus the following decision and recommendation to the General Assembly:

"*The United Nations Commission on International Trade Law*,

"*Recalling* that at its thirty-fourth session, in 2001, it entrusted Working Group IV (Electronic Commerce) with the preparation of an international instrument dealing with issues of electronic contracting,[11] which should also aim at removing obstacles to electronic commerce in existing uniform law conventions and trade agreements,

"*Noting* that the Working Group devoted six sessions, held from 2002 to 2004, to the preparation of the draft convention on the use of electronic communications in international contracts,[12]

"*Having considered* the draft convention at its thirty-eighth session, in 2005,[13]

"*Drawing attention* to the fact that all States and interested international organizations were invited to participate in the preparation of the draft convention at all the sessions of the Working Group and at the thirty-eighth session of the Commission, either as member or as observer, with full opportunity to speak and make proposals,

"*Also drawing attention* to the fact that the text of the draft convention was circulated for comments before the thirty-eighth session of the Commission to all Governments and international organizations invited to attend the meetings of the Commission and the Working Group as observers and that such comments were before the Commission at its thirty-eighth session,[14]

"*Considering* that the draft convention has received sufficient consideration and has reached the level of maturity for it to be generally acceptable to States,

"1. *Submits* to the General Assembly the draft convention on the use of electronic communications in international contracts, as set forth in annex I to the report of the United Nations Commission on International Trade Law on the work of its thirty-eighth session;[15]

"2. *Recommends* that the General Assembly, taking into account the extensive consideration given to the draft convention by the Commission and its Working Group IV (Electronic Commerce), consider the draft convention with a view to adopting, at its sixtieth session, on the basis of the draft convention approved by the Commission, a United Nations convention on the use of electronic communications in international contracts."

IV. Procurement: progress report of Working Group I

168. At its thirty-sixth session, in 2003, the Commission considered a note by the Secretariat on possible future work in the area of public procurement (A/CN.9/539 and Add.1). It was observed that the UNCITRAL Model Law on Procurement of Goods, Construction and Services[16] contained procedures aimed at achieving competition, transparency, fairness, economy and efficiency in the procurement process and that it had become an important international benchmark in procurement law reform. Observing that, despite the widely recognized value of the Model Law, novel issues and practices had arisen since its adoption that might justify an effort to adjust its text, the Commission requested the Secretariat to prepare for its further consideration detailed studies and proposals on how to address those issues and practices.[17]

169. At its thirty-seventh session, in 2004, based on a note by the Secretariat (A/CN.9/553) submitted pursuant to that request, the Commission agreed that the Model Law would benefit from being updated to reflect new practices, in particular those which resulted from the use of electronic communications in public procurement, and the experience gained in the use of the Model Law as a basis for law reform in public procurement as well as possible additional issues. The Commission decided to entrust the preparation of proposals for the revision of the Model Law to its Working Group I (Procurement) and gave the Working Group a flexible mandate to identify the issues to be addressed in its considerations. The Commission also requested the Secretariat to present to the Working Group appropriate notes further elaborating upon issues discussed in the note by the Secretariat (A/CN.9/553) in order to facilitate the considerations of the Working Group.[18] The Commission recalled its earlier statements that, in updating the Model Law, care should be taken not to depart from the basic principles of the Model Law and not to modify the provisions whose usefulness had been proven.

170. At its thirty-eighth session, the Commission took note of the reports of the sixth (Vienna, 30 August-3 September 2004) and seventh (New York, 4-8 April 2005) sessions of the Working Group (A/CN.9/568 and A/CN.9/575, respectively).

171. The Commission was informed that the Working Group had begun its work on the preparation of proposals for the revision of the Model Law at its sixth session, with the preliminary consideration of the following topics: (a) electronic publication of procurement-related information; (b) the use of electronic communications in the procurement process; (c) controls over the use of electronic communications in the procurement process; (d) electronic reverse auctions; (e) the use of suppliers' lists; (f) framework agreements; (g) procurement of services; (h) evaluation and comparison of tenders and the use of procurement to promote industrial, social and environmental policies; (i) remedies and enforcement; (j) alternative methods of

procurement; (k) community participation in procurement; (l) simplification and standardization of the Model Law; and (m) legalization of documents (A/CN.9/WG.I/WP.31 and A/CN.9/WG.I/WP.32). The Commission was further informed that the Working Group at its sixth session had decided to proceed with the in-depth consideration of those topics in sequence at its future sessions (A/CN.9/568, para. 10) and accordingly, at its seventh session, had started the in-depth consideration of the topics related to the use of electronic communications and technologies in the procurement process: (a) electronic publication and communication of procurement-related information; (b) other issues arising from the use of electronic means of communication in the procurement process, such as controls over their use, including the electronic submission of tenders; (c) electronic reverse auctions; and (d) abnormally low tenders (A/CN.9/WG.I/WP.34 and Add.1-2, A/CN.9/WG.I/WP.35 and Add.1 and A/CN.9/WG.I/WP.36). The Commission noted the Working Group's decision to accommodate the use of electronic communications and technologies (including electronic reverse auctions) as well as the investigation of abnormally low tenders in the Model Law and to continue at its eighth session the in-depth consideration of those topics and the revisions to the Model Law that would be necessary in that regard and, time permitting, to take up the topic of framework agreements (A/CN.9/575, para. 9).

172. The Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law. (For the next two sessions of the Working Group, see paragraph 240 (a) below.)

V. Arbitration: progress report of Working Group II

173. At its thirty-second session, in 1999, the Commission, having exchanged views on its future work in the area of international commercial arbitration, decided to entrust that work to one of its working groups. It agreed that the priority items for consideration by the working group should be, inter alia, requirement of written form for the arbitration agreement and enforceability of interim measures of protection.[19] The Working Group, subsequently named Working Group II (Arbitration and Conciliation), commenced its work pursuant to that mandate at its thirty-second session (Vienna, 20-31 March 2000).

174. At its thirty-eighth session, the Commission took note of the progress made by the Working Group at its forty-first (Vienna, 13-17 September 2004) and forty-second (New York, 10-14 January 2005) sessions (see A/CN.9/569 and A/CN.9/573, respectively). The Commission noted that the Working Group had continued its discussions on a draft text for a revision of article 17, paragraph 7, of the UNCITRAL Model Law on International Commercial Arbitration[20] (the "Arbitration Model Law") on the power of an arbitral tribunal to grant interim measures of protection on an ex parte basis. The Commission noted also that the Working Group had discussed a draft provision on the recognition and enforcement of interim measures of protection issued by an arbitral tribunal (for insertion as a new article of the Arbitration Model Law, tentatively numbered 17 bis) and a draft article dealing with interim measures issued by state courts in support of arbitration (for insertion as a new article of the Arbitration Model Law, tentatively numbered 17 ter).

175. The Commission noted the Working Group's progress made so far regarding the issue of interim measures of protection. The Commission also noted that, notwithstanding the wide divergence of views, the Working Group had agreed, at its forty-second session, to include a compromise text of the revised draft of paragraph 7 in draft article 17, on the basis of the principles that that paragraph would apply unless otherwise agreed by the parties, that it should be made clear that preliminary orders had the nature of procedural orders and not of awards and that no enforcement procedure would be provided for such orders in article 17 bis. The Commission noted that the issue of ex parte interim measures remained contentious. Some delegations expressed the hope that the compromise text reached was the final one. Other delegations expressed doubts as to the value of the proposed compromise text, in particular in view of the fact that it did not provide for enforcement of preliminary orders. Concerns were also expressed that the inclusion of such a provision was contrary to the principle of equal access of the parties to the arbitral tribunal and could expose the revised text of the Arbitration Model Law to criticism. A proposal was made that, if the provision were to be included, it should be drafted in the form of an opting-in provision, applying only where the parties had expressly agreed to its application.

176. The Commission noted that the Working Group had yet to finalize its work on draft articles 17, 17 bis and 17 ter, including the issue of the form in which the current and the revised provisions could be presented in the Arbitration Model Law. In respect of the structure of draft article 17, it was proposed that the issue of preliminary orders should be dealt with in a separate article in order to facilitate the adoption of draft article 17 by States that did not wish to adopt provisions relating to preliminary orders. As a matter of drafting, the Commission also took note of a proposal that the revised text of draft articles 17, 17 bis and 17 ter should not be included in the body of the Model Law but in an annex. Also, the Commission noted that the Working Group was expected to complete its work on draft article 7 of the Model Law on the form requirement for an arbitration agreement and on its relation to article II, paragraph 2, of the New York Convention.

177. The Commission expressed its expectation that the Working Group would be able, with two additional sessions, to present its proposals for final review and adoption to the Commission at its thirty-ninth session, in 2006.

178. With respect to future work in the field of settlement of commercial disputes, the Commission took note of the suggestion of the Working Group made at its forty-second session that, once the existing projects currently being considered had been completed, priority consideration might be given to the issues of arbitrability of intra-corporate disputes and other issues relating to arbitrability, for example, arbitrability in the fields of immovable property, insolvency or unfair competition. Another suggestion was that issues arising from online dispute resolution (ODR) and the possible revision of the UNCITRAL Arbitration Rules[21] might also need to be considered (A/CN.9/573, para. 100). Those proposals were supported by the Commission.

179. The Commission was informed that 2006 would mark the thirtieth anniversary of the UNCITRAL Arbitration Rules and that conferences to celebrate that anniversary were expected to be organized in different regions to exchange information on the application and possible areas of revision of the Rules. One such conference would be held in Vienna on 6 and 7 April 2006, under the auspices of the

International Arbitral Centre of the Austrian Federal Economic Chamber. (For the next two sessions of the Working Group, see paragraph 240 (b) below.)

VI. Transport law: progress report of Working Group III

180. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) to prepare, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods by sea, such as the scope of application, the period of responsibility of the carrier, the obligations of the carrier, the liability of the carrier, the obligations of the shipper and transport documents.[22] At its thirty-fifth session, in 2002, the Commission approved the working assumption that the draft instrument on transport law should cover door-to-door transport operations.[23] At its thirty-sixth and thirty-seventh sessions, in 2003 and 2004, respectively, the Commission noted the complexities involved in the preparation of the draft instrument, and authorized the Working Group, on an exceptional basis, to hold its twelfth, thirteenth,[24] fourteenth and fifteenth[25] sessions on the basis of two-week sessions. (For the consideration of the matter at the current session, see paragraph 238 below.) Further, at its thirty-seventh session, the Commission reaffirmed its appreciation of the magnitude of the project and expressed its support for the efforts of the Working Group to accelerate the progress of its work, in particular in view of the Commission's agreement that 2006 would be a desirable goal for completion of the project, but that the issue of establishing a deadline for such completion should be revisited at its thirty-eighth session, in 2005.[26]

181. At its thirty-eighth session, the Commission took note of the progress made by the Working Group at its fourteenth (Vienna, 29 November-10 December 2004) and fifteenth (New York, 18-28 April 2005) sessions (see A/CN.9/572 and A/CN.9/576, respectively).

182. The Commission noted with appreciation the progress that the Working Group had made in its consideration of the draft instrument on the carriage of goods [wholly or partly] [by sea]. The Commission was informed that, at its fourteenth and fifteenth sessions, the Working Group had proceeded with its second reading of the draft instrument and had made good progress regarding a number of difficult issues, including those regarding the basis of liability pursuant to the draft instrument, as well as scope of application of the instrument and related freedom of contract issues. In addition, the Commission also heard that the Working Group had considered during its fourteenth and fifteenth sessions the chapters in the draft instrument on jurisdiction and arbitration and had had an initial exchange of views regarding the topics of right of control and transfer of rights. The Commission was also informed that, following consultations with Working Group IV (Electronic Commerce), the Working Group had considered for the first time, at its fifteenth session, provisions in the draft instrument relating to electronic commerce. The Commission was also informed that, with a view to continuing the acceleration of the exchange of views, the formulation of proposals and the emergence of consensus in preparation for a third and final reading of the draft instrument, a number of delegations participating in the fourteenth and fifteenth sessions of the Working Group had continued their initiative of holding informal consultations for the continuation of discussion between sessions of the Working Group. The Working

Group had considered the issue of the time frame for concluding its work on the draft instrument and a number of delegations supported the view that, while the completion of the work at the end of 2005 was unlikely, with the valuable assistance of the informal consultation process, the Working Group was hoping to complete its work at the end of 2006, with a view to presenting a draft instrument for possible adoption by the Commission in 2007.

183. The Commission commended the Working Group for the progress it had made and reiterated its appreciation of the magnitude of the project and of the difficulties involved in the preparation of the draft instrument, given, in particular, the nature of the interests and complex legal issues involved that required the striking of a delicate balance and consistent and considered treatment of the issues in the text. Several delegations expressed concern with respect to the informal meetings convened between some members of the Working Group and interested parties to discuss issues being considered by the Working Group. While such meetings had enabled the Working Group to make good progress in its work, concern was expressed that many members of the Working Group were not informed of these meetings and were thus unable to participate in substantive discussions on many issues being considered by the Working Group. There was much support for the view that more information should be made available to all members of the Working Group about these meetings, including their time and location. It was suggested that the UNCITRAL website would be a good means of providing such information. Contrary views were expressed. It was also stated that absent from the Commission's meeting, and their views therefore not before that body, were the International Maritime Committee and representatives of shippers, carriers, cargo insurers, freight forwarders and others, all of whose interests were affected by the draft instrument and who had participated in the ad hoc meetings. In addition, it was stated that experts from many States participating in the Commission's meeting were also involved in the ad hoc meetings.

184. The Commission's attention was drawn to the view set out in the report of the fifteenth session of the Working Group (A/CN.9/576, para. 216) that there was support in the Working Group regarding its current working methods, including informal consultation work between sessions and the use of small drafting groups within the Working Group. It was noted that the process should be compatible with the production of official documents in all official languages. While it was clarified that some informal meetings that considered issues on the agenda of UNCITRAL had been convened by other organizations and not by the Secretariat, there was agreement that, in meetings convened by the Secretariat, care should be exercised with respect to allowing experts to express themselves in the working languages of the United Nations and with respect to the translation into all official languages of official documents to be considered by the Working Group. Further, there was agreement that substantive decisions regarding the work should continue to be made only in the Working Group and in the Commission. With respect to a possible time frame for completion of the draft instrument, there was support for the view that it would be desirable to complete a third reading of the draft text as quickly as possible and with a view to its adoption by the Commission in 2007. After discussion, the Commission agreed that 2007 would be a desirable goal for completion of the project, but that the issue of establishing a deadline for such completion should be revisited at its thirty-ninth session, in 2006. (For the next two sessions of the Working Group, see paragraph 240 (c) below.)

VII. Security interests: progress report of Working Group VI

185. At its thirty-fourth session, in 2001, the Commission entrusted Working Group VI (Security Interests) with the task of developing an efficient legal regime for security interests in goods involved in a commercial activity, including inventory.[27] At its thirty-fifth session, in 2002, the Commission confirmed the mandate given to the Working Group and that the mandate should be interpreted widely to ensure an appropriately flexible work product, which should take the form of a legislative guide.[28] At its thirty-sixth session, in 2003, the Commission confirmed that it was up to the Working Group to consider the exact scope of its work and, in particular, whether trade receivables, letters of credit, deposit accounts and intellectual property rights should be covered in the draft legislative guide.[29] At its thirty-seventh session, in 2004, the Commission welcomed the preparation of additional chapters for inclusion in the draft legislative guide on various types of asset, such as negotiable instruments, deposit accounts and intellectual property rights.[30]

186. At its thirty-eighth session, the Commission took note of the reports of the Working Group on the work of its sixth (Vienna, 27 September-1 October 2004) and seventh (New York, 24-28 January 2005) sessions (A/CN.9/570 and A/CN.9/574, respectively). The Commission commended the Working Group for the progress achieved so far. In particular, the Commission noted with appreciation that a complete consolidated set of legislative recommendations, which included, in addition to recommendations on inventory, equipment and trade receivables, recommendations on negotiable instruments, negotiable documents, bank accounts and proceeds from independent undertakings, would be before the Working Group at its eighth session (see para. 240 (f) below). In that connection, the Commission noted that informal expert group meetings were useful in providing advice to the Secretariat with respect to documents to be prepared by the Secretariat but were not meant to involve any negotiations or to result in any decisions binding on the Working Group or the Commission.

187. In addition, the Commission noted with interest the progress made by the Working Group in the coordination of its work with: (a) the Hague Conference on Private International Law, which had prepared the Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary (The Hague, 2002);[31] (b) the International Institute for the Unification of Private Law (Unidroit), which was preparing a draft convention on security and other rights in intermediated securities; (c) the World Bank, which was revising its Principles and Guidelines for Effective Insolvency and Creditor Rights Systems; and (d) the World Intellectual Property Organization. After discussion, the Commission confirmed the mandate given to the Working Group at the thirty-fourth session of the Commission and subsequently confirmed at its thirty-fifth to thirty-seventh sessions (see para. 185 above). The Commission also requested the Working Group to expedite its work so as to submit the draft legislative guide to the Commission, at least for approval in principle, in 2006, and for final adoption in 2007. (For the next two sessions of the Working Group, see paragraph 240 (f) below.)

VIII. Monitoring implementation of the 1958 New York Convention

188. The Commission recalled that, at its twenty-eighth session, in 1995, it had approved a project, undertaken jointly with Committee D of the International Bar Association, aimed at monitoring the legislative implementation of the New York Convention.[32] At its thirty-seventh session, in 2004, the Commission requested the Secretariat, subject to the availability of the necessary resources, to undertake its best efforts to produce for consideration by the Commission at its thirty-eighth session a preliminary analysis of the replies received by the Secretariat in response to the questionnaires circulated in connection with the project.[33]

189. In accordance with that request, the Secretariat presented an interim report to the Commission at its thirty-eighth session (A/CN.9/585), which set out the issues raised by the replies received and also set out additional questions that the Commission might request the Secretariat to put to States in order to obtain more comprehensive information regarding implementation practice. The Commission expressed its appreciation to those States parties which had provided replies since its thirty-seventh session and reiterated its appeal to the remaining States parties to send replies.

190. The Commission welcomed the progress reflected in the interim report, noting that the general outline of replies received served to facilitate discussions as to the next steps to be taken and highlighted areas of uncertainty where more information could be sought from States parties or further studies could be undertaken. It was pointed out that, taking into account that questionnaires had been circulated since 1995, the work should be finalized in due course. It was also noted that, given the limited resources of the Secretariat, care should be taken to ensure that the work undertaken by the Secretariat in relation to the project did not duplicate the extensive research on the implementation of the New York Convention that already existed and was ongoing. In that respect, the Commission was informed that the Secretariat's ongoing work on the project had not had a negative impact on other work, including servicing of Working Group II (Arbitration and Conciliation).

191. The Commission considered the approach taken in preparing the interim report, including the style and presentation and level of detail, to be appropriate, but considered that it might be helpful to provide more detailed indications, including the naming of States, as appropriate. It was suggested that one possible future step could be the development of a legislative guide to limit the risk that state practice would diverge from the spirit of the New York Convention. The Commission was generally of the view that appointing national experts on international arbitration would be of assistance to the Secretariat in completing its work. Concern was expressed that it would be difficult to identify experts who could provide a comprehensive overview of national practice. However, it was recommended that relevant arbitration centres or academic organizations, as might be appointed by States, also assist the Secretariat in its work. After discussion, the Commission agreed that a level of flexibility should be left to the Secretariat in determining the time frame for completion of the project, the level of detail that should be reflected in the report that the Secretariat would present for the consideration by the Commission in due course, whether or not individual States should be identified by name in that report and the extent to which references to case law should be made in

the report, and in ensuring that the work by the Secretariat on the project was not duplicative of work undertaken in other forums with respect to the survey of the implementation of the New York Convention.

IX. Case law on UNCITRAL texts, digests of case law

192. The Commission noted with appreciation the continuing work under the system established for the collection and dissemination of case law on UNCITRAL texts (CLOUT), consisting of the preparation of abstracts of court decisions and arbitral awards relating to UNCITRAL texts, compilation of the full texts of those decisions and awards, as well as of the preparation of research aids and analytical tools. As at 13 July 2005, 46 issues of CLOUT had been prepared for publication, dealing with 530 cases, relating mainly to the United Nations Sales Convention and the Arbitration Model Law.

193. It was widely agreed that CLOUT continued to be an important tool of the overall training and technical assistance activities undertaken by UNCITRAL and that the wide distribution of CLOUT in both paper and electronic formats, in all the six official languages of the United Nations, promoted the uniform interpretation and application of UNCITRAL texts by facilitating access to decisions and awards from many jurisdictions. The Commission expressed its appreciation to the national correspondents for their work in selecting decisions and preparing case abstracts.

194. The Commission noted that the digest of the case law on the United Nations Sales Convention, prepared pursuant to the Commission's request at its thirty-fourth session,[34] had been published in December 2004. It also noted that the first draft of a digest of case law related to the Arbitration Model Law had been prepared pursuant to the Commission's request at its thirty-fifth session[35] and taking into account the relevant discussion at its thirty-seventh session.[36] The Commission was informed that the draft digest would be before the CLOUT national correspondents at their meeting on 14 and 15 July 2005.

X. Technical assistance to law reform

195. The Commission had before it a note by the Secretariat (A/CN.9/586) describing the technical assistance activities undertaken since its thirty-seventh session and the direction of future activities. The Commission expressed its appreciation for the technical assistance activities undertaken by the Secretariat since the thirty-seventh session of the Commission (A/CN.9/586, para. 8) and noted, in addition, the seminars, conferences and courses where UNCITRAL texts had been presented and in which members of the Secretariat had participated as speakers (A/CN.9/586, para.15).

196. The Commission noted the establishment of the legislative and technical assistance units within its secretariat and the administrative arrangements for conducting the work of the two units. With respect to the technical assistance unit, the Commission also noted that its secretariat had identified the goals of that unit and had taken steps to draft guidelines addressing the requirements for organizing, implementing and reporting of technical assistance activities requested by States and by international and regional organizations. It further noted that its secretariat

was beginning to identify national and regional needs for technical assistance, in conjunction with national, regional and international organizations and permanent missions to the United Nations, as well as opportunities for the development of joint programmes with, and participation in existing programmes of, organizations providing technical assistance to trade law reform.

197. The Commission reiterated its appeal to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL Trust Fund for Symposia, if possible in the form of multi-year contributions, or as purpose-specific contributions, so as to facilitate planning and enable the Secretariat to meet the increasing demands from developing countries and States with economies in transition for training and technical legislative assistance. The Commission expressed its appreciation to those States which had contributed to the fund since the thirty-seventh session, namely, Mexico, Singapore and Switzerland, and also to organizations that had contributed to the programme by providing funds or staff or by hosting seminars.

198. The Commission appealed to the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund established to provide travel assistance to developing countries that were members of the Commission. The Commission noted that no contributions to the trust fund for travel assistance had been received since the thirty-seventh session.

XI. Status and promotion of UNCITRAL legal texts

199. The Commission considered the status of the conventions and model laws emanating from its work, as well as the status of the New York Convention, on the basis of a note by the Secretariat (A/CN.9/583). The Commission noted with appreciation the new actions and enactments of States and jurisdictions since its thirty-seventh session regarding the following instruments:

(a) United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). New actions by Cyprus and Gabon; number of States parties: 65;

(b) United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988).[37] New action by Gabon; number of States parties: 4;

(c) United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991).[38] New action by Gabon; number of States parties: 3;

(d) United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995).[39] New action by Gabon; number of States parties: 7;

(e) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). New action by Afghanistan; number of States parties: 135;

(f) UNCITRAL Model Law on International Commercial Arbitration (1985). New jurisdictions that had enacted legislation based on the Model Law: Chile and Philippines;

(g) UNCITRAL Model Law on Electronic Commerce (1996). New jurisdictions that had enacted legislation based on the Model Law:[40] Chile and, within the United States, the State of Wisconsin;

(h) UNCITRAL Model Law on Cross-Border Insolvency (1997).[41] New jurisdictions that had enacted legislation based on the Model Law: British Virgin Islands, overseas territory of the United Kingdom, and United States;

(i) UNCITRAL Model Law on Electronic Signatures (2001). New jurisdiction that had enacted legislation based on the Model Law: Republic of Korea.

200. It was noted that one State enacting the UNCITRAL Model Law on Cross-Border Insolvency (see para. 199 (h) above) into its bankruptcy code had changed the format of its legislation to make clear that it originated from the UNCITRAL text.

201. It was noted that the UNCITRAL Model Law on International Commercial Conciliation (2002)[42] would be included in the next revision of the report on the status and promotion of UNCITRAL texts.

202. The Commission requested States that had enacted or were about to enact legislation based on a model law prepared by the Commission or that were considering legislative action regarding a convention resulting from the work of the Commission to inform the secretariat of the Commission accordingly. The Commission noted with appreciation reports by a number of States that official action was being considered with a view to adherence to various conventions and the adoption of legislation based on various model laws prepared by UNCITRAL. The Commission was informed that, pursuant to its request at its thirty-seventh session,[43] the Secretariat would include copies of national enactments of UNCITRAL model laws on the UNCITRAL website in the original language and, where available, in a translation, even if unofficial, into one or more of the official languages of the United Nations.

203. The Commission was informed that a series of conferences were being held in different countries to celebrate the twenty-fifth anniversary of the United Nations Sales Convention and the twentieth anniversary of the Arbitration Model Law, and that efforts would be made to publish their proceedings.

204. The Commission had before it a note by the Secretariat (A/CN.9/580 and Add.2) outlining developments in the area of cross-border insolvency, including enactments of the UNCITRAL Model Law on Cross-Border Insolvency and the interpretation in the European Union of certain concepts common to both the Model Law and law of the European Union. The Commission took note with satisfaction of the report on developments with enactments of the Model Law. It was noted that the Secretariat would continue to monitor those decisions of the courts of the European Union which were relevant to interpretation of concepts used in the Model Law.

XII. Relevant General Assembly resolutions

205. The Commission took note with appreciation of General Assembly resolutions 59/39, on the report of the Commission on the work of its thirty-seventh session, and 59/40, on the UNCITRAL Legislative Guide on Insolvency Law, both of 2 December 2004.

206. The Commission took particular note of those parts of resolution 59/39 in which the General Assembly expressed its concern that activities undertaken by other bodies in the field of international trade law without adequate coordination with the Commission might lead to undesirable duplication of efforts and would not be in keeping with the aim of promoting efficiency, consistency and coherence in the unification and harmonization of international trade law, and in which the Assembly reaffirmed the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to coordinate legal activities in this field. Note was taken with appreciation of paragraph 4 of the resolution, in which the Assembly endorsed the efforts and initiatives of the Commission aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law.

XIII. Coordination and cooperation

A. General

207. The Commission had before it a note by the Secretariat (A/CN.9/584) providing a brief survey of the work of international organizations related to the harmonization of international trade law, focusing upon substantive legislative work, as well as two additional notes addressing specific areas of activity, electronic commerce (A/CN.9/579) (see paras. 213-215 below) and insolvency law (A/CN.9/580/Add.1). The Commission commended the Secretariat for the preparation of those reports, recognizing their value to coordination of the activities of international organizations in the field of international trade law, and noted with appreciation that the survey contained in the note by the Secretariat (A/CN.9/584) was the first in a series that would be updated and revised on an annual basis. A number of suggestions for additional information were made. The Commission noted that the first of a series of parallel reports on the activities of international organizations providing technical assistance to law reform in the areas of international trade law of interest to the Commission would be prepared for its thirty-ninth session in 2006.

208. It was recalled that the Commission had generally agreed at its thirty-seventh session that it should adopt a more proactive attitude, through its secretariat, to fulfilling its coordination role.[44] The Commission, recalling the statement by the General Assembly in its resolution 59/39 regarding the importance of coordination (see para. 206 above), noted with appreciation that the Secretariat was taking steps to engage in a dialogue, on both legislative and technical assistance activities, with a number of organizations, including the World Bank, the International Monetary Fund (IMF), the Common Market for Eastern and Southern Africa, the Hague

Conference on Private International Law, the International Council for Commercial Arbitration, the International Development Law Organization, the Organization of American States and Unidroit. The Commission noted that that work often involved travel to meetings of those organizations and the expenditure of funds allocated for official travel. The Commission reiterated the importance of coordination work being undertaken by UNCITRAL as the core legal body in the United Nations system in the field of international trade law and supported the use of travel funds for that purpose.

B. Insolvency law

1. Future work on insolvency law

209. The Commission had before it a series of proposals, on which it heard presentations, for future work in the area of insolvency law (A/CN.9/582 and Add.1-7), specifically on treatment of corporate groups in insolvency, cross-border insolvency protocols in transnational cases, post-commencement financing in international reorganizations, directors' and officers' responsibilities and liabilities in insolvency and pre-insolvency cases, and commercial fraud and insolvency. The Commission recalled that several of those topics had arisen in the context of the development of the *UNCITRAL Legislative Guide on Insolvency Law*,[45] but that the treatment in the *Legislative Guide* was either limited to a brief introduction, as in the case of treatment of corporate groups in insolvency, or limited to domestic insolvency law, as in the case of post-commencement financing. It was acknowledged that undertaking further work on those two topics would build upon and complement the work already completed by the Commission. Similarly, the Commission agreed that the proposal on cross-border insolvency protocols was closely related and complementary to the promotion and use of a text already adopted by the Commission, the Model Law on Cross-Border Insolvency. It was recalled that a study on commercial fraud was being undertaken by the United Nations Office on Drugs and Crime (UNODC) in cooperation with the UNCITRAL secretariat and that, in addition to issues of criminal law, that work included aspects of civil law that would be relevant to insolvency. The Commission was of the view that any future work on commercial fraud in the area of insolvency should be coordinated with the results of that study (see para. 218 below). The Commission noted that, while the topic of directors' and officers' liability was an important one, it might involve questions of criminal law that would be outside the mandate of the Commission or questions for which it might be difficult to find harmonized solutions. For those reasons, that topic might not be as susceptible as other topics to future work at that time.

210. After discussion, some preference for the topics of corporate groups, cross-border protocols and post-commencement financing was expressed. The Commission agreed that to facilitate further consideration and obtain the views and benefit from the expertise of international organizations and insolvency experts, an international colloquium should be held, similar to the UNCITRAL/INSOL International/International Bar Association Global Insolvency Colloquium (Vienna, 4-6 December 2000), which had been a key part of the work on the development of the *UNCITRAL Legislative Guide on Insolvency Law* (see A/CN.9/495). The Commission agreed that in preparing the programme for that colloquium, to be held

in Vienna from 14 to 16 November 2005, the Secretariat should take into account the discussion in the Commission in determining priorities.

2. Coordination with the World Bank and the International Monetary Fund

211. The Commission recalled that, at its thirty-seventh session, in its decision adopting the *UNCITRAL Legislative Guide on Insolvency Law*, it had confirmed its intention to continue coordination and cooperation with the World Bank and IMF to facilitate the development of a unified international standard in the area of insolvency law.[46] That standard was being developed in the context of the joint World Bank/IMF initiative on standards and codes (Reports on Standards and Codes (ROSC)), insolvency being one of the 12 areas that was identified as useful for the operational work of the Bank and IMF and for which standard assessments had been, and were to continue to be, undertaken. Those assessments were designed to assess a country's institutional practices against an internationally recognized standard and, if needed, provide recommendations for improvement. They were conducted on a voluntary basis and at the request of a country, the results being confidential unless the country agreed to publication of an executive summary. The uniform standard was to be based upon a framework that included both the World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems and the *UNCITRAL Legislative Guide on Insolvency Law* as independent texts. It was not expected that the two texts would be combined as a single publication.

212. The Commission was informed that staff of the World Bank and IMF would recommend that their respective executive boards recognize those documents as constituting the unified standard for insolvency and creditor rights systems for use in the two institutions' operational work. Recognition by the two executive boards would allow ROSC assessments to be conducted on the basis of the unified standard on insolvency and creditor rights systems. The unified standard forms the basis of a methodology document that is being developed by the Bank, in coordination with IMF and UNCITRAL, within the parameters of the joint World Bank/IMF initiative on standards and codes.

C. Electronic commerce

213. The Commission considered the possibility of undertaking future work in the area of electronic commerce in the light of a note submitted by the Secretariat in pursuance of the Commission's mandate to coordinate international legal harmonization efforts in the area of international trade law, in which the Secretariat summarized the work undertaken by other organizations in various areas related to electronic commerce (A/CN.9/579). It was pointed out that the range of issues currently being dealt with by various organizations were indicative of the various elements required to establish a favourable legal framework for electronic commerce. The UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures, as well as the draft convention on the use of electronic communications in international contracts, which the Commission had approved in its current session (see para. 166 above), provided a good basis for States to facilitate electronic commerce, but only addressed a limited number of issues. Much more needed to be done to enhance confidence and trust in electronic commerce, such as appropriate

rules on consumer and privacy protection, cross-border recognition of electronic signatures and authentication methods, measures to combat computer crime and cybercrime, network security and critical infrastructure for electronic commerce and protection of intellectual property rights in connection with electronic commerce, among various other aspects. At present, there was no single international document providing guidance to which legislators and policymakers around the world could refer for advice on those various aspects. The task of legislators and policymakers, in particular in developing countries, might be greatly facilitated if such a comprehensive reference document were to be formulated.

214. The Commission welcomed the information provided in the note by the Secretariat and confirmed the usefulness of such cross-sectoral overview of activities from the viewpoint both of its coordination activities and of the information requirements of Member States. There was general agreement that it would be useful for the Secretariat to prepare a more detailed study, in cooperation and in consultation with the other international organizations concerned, for consideration by the Commission at its thirty-ninth session, in 2006. Such a detailed overview, with proposals as to the form and nature of the reference document that would be envisaged, would be useful to allow the Commission to consider possible areas in which it could undertake legislative work in the future, as well as areas in which legislators and policymakers might benefit from comprehensive information, which did not necessarily need to take the form of specific legislative guidance. In considering that matter, the Commission should bear in mind the need to ensure appropriate coordination and consultation with other organizations and to avoid duplicating or overlapping work. It was also suggested that the overview should provide more detail on the work of some regional organizations than was contained in the note by the Secretariat.

215. As regards the range of issues to be considered in such a detailed overview, the following areas were suggested: transfer of rights in tangible goods or other rights through electronic communications, intellectual property rights, information security, cross-border recognition of electronic signatures, electronic invoicing and online dispute resolution. The Commission's attention was also drawn to the recommendations for future work that had been made by the Working Group (see A/CN.9/571, para. 12). It was agreed that those recommendations should also be considered in the context of the detailed overview to be prepared by the Secretariat, to the extent that some of them would not be reflected in the explanatory notes to the convention on the use of electronic communications in international contracts (see para. 165 above), or in separate information activities undertaken by the Secretariat, such as monitoring the implementation of the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures, and compiling judicial decisions on the matters dealt with in those Model Laws.

D. Commercial fraud

216. The Commission recalled its consideration of the subject at its thirty-fifth to thirty-seventh sessions, in 2002 to 2004, respectively.[47] At its thirty-seventh session, in 2004, the Commission had agreed that it would be useful if, wherever appropriate, examples of commercial fraud were to be discussed in the particular contexts of projects worked on by the Commission so as to enable delegates

involved in those projects to take the problem of fraud into account in their deliberations. In addition, the Commission agreed that the preparation of lists of common features present in typical fraudulent schemes could be useful as educational material for participants in international trade and other potential targets of perpetrators of frauds to the extent they would help them protect themselves and avoid becoming victims of fraudulent schemes. While it was not proposed that the Commission itself or its intergovernmental working groups be directly involved in those efforts, it was agreed that the Secretariat would keep the Commission informed regarding such activity.[48]

217. In that regard, the Commission's attention was drawn to Economic and Social Council resolution 2004/26 of 21 July 2004, entitled "International cooperation in the prevention, investigation, prosecution and punishment of fraud, the criminal misuse and falsification of identity and related crimes", in which the Council requested the Secretary-General to convene an intergovernmental expert group to prepare a study on fraud and the criminal misuse and falsification of identity and to develop on the basis of the study useful practices, guidelines or other materials, taking into account in particular the relevant work of UNCITRAL, and recommended that the Secretary-General designate UNODC to serve as secretariat for the intergovernmental expert group, in consultation with the secretariat of UNCITRAL.

218. At its thirty-eighth session, the Commission heard an oral report from the Secretariat regarding the results of the intergovernmental expert group meeting, organized by UNODC from 17 to 18 March 2005, which were reported to the Commission on Crime Prevention and Criminal Justice at its fourteenth session (Vienna, 23-27 May 2005; see E/CN.15/2005/11). The United Nations Commission on International Trade Law was informed that the participants at the expert group meeting had indicated that fraud was a serious concern for their Governments and represented a problem that was rapidly expanding, both in the range of frauds being committed and their geographical scope and diversity, owing in part to developments in technology. Participants had agreed that a study of the problem should be undertaken, based on information received from Member States in response to a questionnaire on fraud and the criminal misuse and falsification of identity (identity fraud) to be circulated by UNODC. The Commission was informed that the UNCITRAL secretariat had participated in the expert group meeting and that the group had taken note of the willingness expressed by the UNCITRAL secretariat to assist UNODC in the preparation of the study and the drafting and dissemination of the questionnaire.

219. The Commission took note of the Economic and Social Council resolution and support was expressed for the assistance of the UNCITRAL secretariat in the UNODC project. The view was expressed that the commercial and criminal law aspects of the topic of fraud provided a solid basis for the UNCITRAL secretariat cooperation with UNODC and could provide for more prophylactic coverage of the topic, in particular in the light of the suggestion that fraudulent activity was taking advantage of the gap between the commercial and criminal treatment of fraud. However, as had been expressed at previous sessions, several delegations stressed that, given the Commission's mandate to harmonize trade law and enhance expertise in that area, work on this topic should stay within the parameters of commercial fraud and not stray into criminal law concerns, especially as there were numerous

other international agencies working in the area of crime and law enforcement. Another view was that civil aspects of commercial fraud appeared often to fall outside the usual areas of work by other international bodies. It was suggested that commercial fraud should remain a potential topic for future work, pending the outcome of the UNODC study, and any future decisions of the Commission in that regard.

220. In response to an inquiry, it was clarified that the insolvency colloquium planned for November 2005 (see para. 210 above) could consider an aspect of fraud in relation to insolvency, but only insofar as considering a targeted legislative response to deter fraudulent practices in cases of insolvency, rather than serving the educational and preventive goals of general work on commercial fraud. The Commission reiterated the mandate given to its secretariat, operating within existing resources and operational requirements, for an initiative to develop lists of common features present in typical fraudulent schemes (see para. 216 above) and requested its secretariat to consider how best to coordinate that work with the preparation of the UNODC study entrusted to the intergovernmental expert group.

E. Reports of other international organizations

1. Council of Europe

221. The Commission heard a statement on behalf of the Council of Europe on the Convention on Cybercrime (Budapest, 2001),[49] which entered into force on 1 July 2004. The Commission was informed that the Convention obliged Governments to introduce a harmonized notion of computer-related offences in their national legal systems; to establish certain harmonized procedures of investigation and prosecution; to establish an institutional capacity permitting judicial organs to combat computer-related offences; to establish appropriate conditions for direct cooperation between public institutions as well as between them and entities from the private sector; to establish effective regimes for judicial assistance that would permit direct cross-border cooperation; and to create an intergovernmental system for urgent intervention.

222. It was emphasized that the Convention on Cybercrime was not limited to the European continent; a number of non-European States had participated in its negotiations and, in addition to signature by 31 member States of the Council of Europe, it had been signed by non-members such as Canada, Japan, South Africa and the United States.

223. Noting that declarations in support of the Convention had been adopted in several organizations such as Asia-Pacific Economic Cooperation, the Commonwealth and the Organization of American States and endorsed at a summit of the Group of Eight and that the Convention presented a useful complement to the draft convention on the use of electronic communications in international contracts, it was suggested on behalf of the Council of Europe that the Commission might wish to join the movement to encourage Governments to adhere to the Convention on Cybercrime or to enact its principles in their national laws.

224. The Commission, having expressed its appreciation to the representative of the Council of Europe for the presentation of the Convention on Cybercrime, recalled

its plan to consider at its next session a proposal for a coordinated legislative reference document on electronic commerce (see paras. 214 and 215 above) and agreed that the Convention might usefully be included in that context, in view of the increasing vulnerability of international trade to abusive or fraudulent use of Internet technology and the potential of the Convention to provide Governments and the private sector with useful tools to fight cybercrime.

2. International Council for Commercial Arbitration

225. The Commission heard a statement on behalf of the International Council for Commercial Arbitration on the importance of the role of courts in the arbitral process and of activities undertaken by the Council to provide technical assistance to judges in that regard. The Commission was informed that the Council was willing to assist and cooperate with UNCITRAL in that area of technical assistance, including with the development of materials that might be used to facilitate that technical assistance.

3. Hague Conference on Private International Law

226. The Commission heard a statement on behalf of the Hague Conference on Private International Law reporting on progress with a number of projects, including:

(a) The conclusion of the diplomatic conference in June 2005 with the adoption of a new Convention on Choice of Court Agreements[50] (an explanatory report to be published later in 2005);

(b) An international forum held in May 2005 on e-Notarization and e-Apostille, in particular with respect to application of the Convention Abolishing the Requirement of Legalization for Foreign Public Documents (The Hague, 1961);[51]

(c) A conference held in October 2004 on the practical interplay of existing instruments in international trade law and dispute resolution with regard to electronic transactions, the proceedings of which were to be published in 2005.

227. The Commission was also informed that Paraguay had become a member of the Hague Conference and that the Statute of the Hague Conference[52] had been amended to permit economic integration organizations to become members.[53]

4. International Institute for the Unification of Private Law

228. The Secretary-General of the International Institute for the Unification of Private Law (Unidroit) reported on progress with a number of different projects, including:

(a) The expected entry into force, in the next few months, of the Protocol to the Cape Town Convention on Matters Specific to Aircraft Equipment (Cape Town, 2001)[54] and the establishment, within the International Civil Aviation Organization, of the registry function under that Convention;

(b) The proposal to convene a diplomatic conference in 2006 on the second protocol to the Cape Town Convention, dealing with the financing of railway rolling stock, the continuing negotiation of the third protocol, dealing with space assets,

and with proposals for further protocols on agricultural, construction and mining equipment;

(c) The addition, in 2004, of six chapters to the Uniform Principles of International Commercial Contracts[55] and proposals for further additions;

(d) The adoption in 2004 of the Principles of Transnational Civil Procedure;[56]

(e) Continuing negotiation of a draft convention on substantive rules regarding securities held with intermediaries;

(f) Development of a uniform contract law for States parties to the Treaty on the Harmonization of Business Law in Africa;[57]

(g) Planning for future projects on a legislative guide on capital markets law and a model law on international financial leasing, as follow-up to the Convention on International Financial Leasing (Ottawa, 1988).[58]

229. The Commission was informed that Unidroit would, at some future date, seek endorsement by the Commission of the Principles of International Commercial Contracts.[59]

5. International Monetary Fund

230. The Commission heard a statement on behalf of IMF on the coordination of its legal work, in particular technical assistance, with other organizations. It was noted that technical assistance was generally delivered at the request of States, with the demand for assistance generally exceeding capacity. Most technical assistance was directed at assisting States with economic development and financial stability reform, including with respect to central banking and banking regulation; fiscal issues; anti-money-laundering and financing of terrorism; creditor rights, including insolvency, secured transactions and enforcement of financial claims; and governance of public institutions. Technical assistance generally involved drafting of legislation and regulations; seminars and training for lawyers and judges; and participation in the development of international best practices and standards, such as the *UNCITRAL Legislative Guide on Insolvency Law*. Delivery of the Fund's technical assistance programme was informed by coordination with other organizations active in those fields.

F. Congress 2007

231. The Commission approved the plan, in the context of the fortieth annual session of the Commission in Vienna, in 2007, to hold a congress similar to the UNCITRAL Congress on Uniform Commercial Law in the Twenty-first Century (New York, 18-22 May 1992).[60] The Commission envisaged that the congress would review the results of the past work programme of UNCITRAL, as well as related work of other organizations active in the field of international trade law, assess current work programmes and consider and evaluate topics for future work programmes.

XIV. Other business

A. Willem C. Vis International Commercial Arbitration Moot

232. It was noted that the Institute of International Commercial Law at Pace University School of Law in White Plains, New York, had organized the Twelfth Willem C. Vis International Commercial Arbitration Moot in Vienna from 18 to 24 March 2005. As in previous years, the Moot had been co-sponsored by the Commission. It was noted that legal issues dealt with by the teams of students participating in the Twelfth Moot had been based on the United Nations Sales Convention, the Swiss Rules of International Arbitration,[61] the Arbitration Model Law and the New York Convention. Some 151 teams from law schools in 46 countries had participated in the Twelfth Moot. The best team in oral arguments was that of Stetson University, Florida, United States, followed by the University of Vienna, Austria. The Commission noted that its secretariat had also organized lectures relating to its work coinciding with the period in which the Moot had been held. The Thirteenth Willem C. Vis International Commercial Arbitration Moot would be held in Vienna from 7 to 13 April 2006.

233. The Commission heard a report about the history, growth and features of the Moot. Statements were made highlighting the importance of the Moot as a means of introducing law students to the work of UNCITRAL and to its uniform legal texts, in particular in the areas of contract law and arbitration. The Commission noted the positive impact that the Moot had on law students, professors and practitioners around the world. It was widely felt that the annual Moot, with its extensive oral and written competition, and its broad international participation, presented an excellent opportunity to disseminate information about UNCITRAL, its legal texts and for teaching international trade law. The suggestion was made that information about the Moot should be circulated more widely in law schools and universities and that the Moot should be considered an important part of the UNCITRAL technical assistance programme.

234. The Commission expressed its gratitude to the organizers and sponsors of the Moot for their efforts to make it successful and hoped that the international outreach and positive impact of the Moot would continue to grow. Special appreciation was expressed to Eric E. Bergsten, former Secretary of the Commission, for the development and direction of the Moot since its inception in 1993-1994.

B. UNCITRAL information resources

235. The Secretariat presented to the Commission the new UNCITRAL website (www.uncitral.org) launched in June 2005. The Commission welcomed the new website and noted with appreciation the extended implementation of the principle of multilingualism in the website, as well as its enhanced functionality, which further facilitated delegates' access to documents. The Commission considered the UNCITRAL website an important component of the Commission's overall programme of information activities and training and technical assistance and encouraged the Secretariat to further maintain and upgrade the website in accordance with the existing guidelines.

C. Bibliography

236. The Commission noted with appreciation the bibliography of recent writings related to its work (A/CN.9/581). The Commission was informed that the bibliography was being updated on the UNCITRAL website on an ongoing basis. The Commission stressed that it was important for the bibliography to be as complete as possible and, for that reason, requested Governments, academic institutions, other relevant organizations and individual authors to send copies of relevant publications to its secretariat.

XV. Date and place of future meetings

A. General discussion on the duration of sessions

237. The Commission recalled that, at its thirty-sixth session, it had agreed that: (a) working groups should normally meet for a one-week session twice a year; (b) extra time, if required, could be allocated from the unused entitlement of another working group provided that such an arrangement would not result in the increase of the total number of 12 weeks of conference services per year currently allotted to sessions of all six working groups of the Commission; and (c) if any request by a working group for extra time would result in the increase of the 12-week allotment, it should be reviewed by the Commission, with proper justification being given by that working group regarding the reasons for which a change in the meeting pattern was needed.[62]

238. At its thirty-eighth session, for the reasons noted by the Commission at its thirty-sixth session,[63] the Commission decided to accommodate again the need of Working Group III (Transport Law) for two-week sessions, utilizing the entitlement of Working Group IV (Electronic Commerce), which was not expected to meet in the second half of 2005 or in 2006. In addition, the Commission noted that Working Group V (Insolvency Law) was not expected to meet before the Commission's thirty-ninth session. Meeting dates from 1 to 5 May 2006 reserved for that Working Group would therefore be available for another working group that might need to hold a longer or an additional session.

B. Thirty-ninth session of the Commission

239. The Commission approved the holding of its thirty-ninth session in New York, from 19 June to 7 July 2006. The duration of the session might be shortened, should a shorter session become advisable in view of the draft texts produced by the various working groups.

C. Sessions of working groups up to the thirty-ninth session of the Commission

240. The Commission approved the following schedule of meetings for its working groups:

(a) Working Group I (Procurement) would hold its eighth session in Vienna from 7 to 11 November 2005 and its ninth session in New York from 24 to 28 April 2006;

(b) Working Group II (Arbitration and Conciliation) would hold its forty-third session in Vienna from 3 to 7 October 2005 and its forty-fourth session in New York from 23 to 27 January 2006;

(c) Working Group III (Transport Law) would hold its sixteenth session in Vienna from 28 November to 9 December 2005 and its seventeenth session in New York from 3 to 13 April 2006 (the United Nations will be closed on 14 April);

(d) Working Group IV (Electronic Commerce). No session of the Working Group was envisaged;

(e) Working Group V (Insolvency Law). No session of the Working Group was envisaged;

(f) Working Group VI (Security Interests) would hold its eighth session in Vienna from 5 to 9 September 2005 and its ninth session in New York from 30 January to 3 February 2006.

D. Sessions of working groups in 2006 after the thirty-ninth session of the Commission

241. The Commission noted that tentative arrangements had been made for working group meetings in 2006 after its thirty-ninth session (the arrangements were subject to the approval of the Commission at its thirty-ninth session):

(a) Working Group I (Procurement) would hold its tenth session in Vienna from 4 to 8 December 2006;

(b) Working Group II (Arbitration and Conciliation) would hold its forty-fifth session in Vienna from 11 to 15 September 2006;

(c) Working Group III (Transport Law) would hold its eighteenth session in Vienna from 6 to 17 November 2006;

(d) Working Group IV (Electronic Commerce). No session of the Working Group was envisaged;

(e) Working Group V (Insolvency Law) would hold its thirty-first session in Vienna from 11 to 15 December 2006;

(f) Working Group VI (Security Interests) would hold its tenth session in Vienna from 18 to 22 September 2006.

Notes

[1] Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 17 were elected by the Assembly at its fifty-fifth session, on 16 October 2000 (decision 55/308), and 43 were elected by the Assembly at its fifty-eighth session, on 17 November 2003 (decision 58/407). By its

resolution 31/99, the Assembly altered the dates of commencement and termination of membership by deciding that members would take office at the beginning of the first day of the regular annual session of the Commission immediately following their election and that their terms of office would expire on the last day prior to the opening of the seventh regular annual session of the Commission following their election.

[2] United Nations, *Treaty Series*, vol. 1489, No. 25567.

[3] United Nations publication, Sales No. 71.V.3.

[4] United Nations, *Treaty Series*, vol. 330, No. 4739.

[5] For the text of the Convention, see "Final Act of the Thirteenth Session of the Hague Conference on Private International Law", *Actes et Documents de la Treizième session (1976)*, tome I.

[6] For the text of the Model Law, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), annex I. The Model Law and its accompanying Guide to Enactment have been published as a United Nations publication (Sales No. E.99.V.4).

[7] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"). *Official Journal of the European Union*, No. L 178, 17 July 2000, p. 1.

[8] For the text of the Model Law, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* (A/56/17), annex II. The Model Law and its accompanying Guide to Enactment have been published as a United Nations publication (Sales No. E.02.V.8).

[9] Available at http://www.unidroit.org/english/conventions/mobile-equipment/main.htm.

[10] United Nations, *Treaty Series*, vol. 1155, No. 18232.

[11] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), paras. 291-293.

[12] For the reports of the Working Group, see A/CN.9/509, A/CN.9/527, A/CN.9/528, A/CN.9/546, A/CN.9/548 and A/CN.9/571.

[13] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), paras. 12-166.

[14] A/CN.9/578 and Add.1-17.

[15] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17).

[16] Ibid., *Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I.

[17] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 225-230.

[18] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 80-82.

[19] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 380.

[20] Ibid., *Fortieth Session, Supplement No. 17* (A/40/17), annex I. The Model Law has been published as a United Nations publication (Sales No. E.95.V.18).

[21] *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17* (A/31/17), para. 57.

[22] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 345.

[23] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 224.

[24] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 208.

[25] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 133.

[36] Ibid., paras. 64-66.

[37] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 358.

[38] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 204.

[39] Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 222.

[40] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 77.

[41] Available at http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=72.

[42] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17* (A/50/17), paras. 401-404.

[43] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 84.

[44] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 395.

[45] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 243.

[46] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 88, 89 and 91.

[47] United Nations publication, Sales No. E.95.V.16.

[48] *Official Records of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade, Vienna, 2-19 April 1991* (United Nations publication, Sales No. E.93.XI.3), part I, document A/CONF.152/13, annex.

[49] United Nations publication, Sales No. E.97.V.12.

[50] The Republic of Korea stated that the reference to the Republic of Korea in paragraph 9 of document A/CN.9/583 should have been accompanied by a footnote explaining that in 1999 the Republic of Korea enacted legislation implementing provisions of the UNCITRAL Model Law on Electronic Commerce except for its provisions on certification of electronic signatures.

[51] United Nations publication, Sales No. E.99.V.3.

[52] United Nations publication, Sales No. E.05.V.4.

[53] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 98.

[54] Ibid., para. 114.

[55] United Nations publication, Sales No. E.05.V.10.

[56] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 55.

[57] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 279-290; ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 234-241; and ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 110-112.

[58] Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 110-112.

[59] Available at http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm.

[60] Available at http://www.hcch.net/index_en.php?act=conventions.text&cid=98.

[61] Available at http://www.hcch.net/index_en.php?act=conventions.text&cid=41.

[62] Entered into force on 15 July 1955. The text is available at http://www.hcch.net/index_en.php?act=conventions.text&cid=29.

[63] For information on the work of the Hague Conference on Private International Law, see http://www.hcch.net/index_en.php?act=home.splash.

[64] Available at http://www.unidroit.org/english/conventions/mobile-equipment/main.htm.

[55] Available at http://www.unidroit.org/english/principles/contracts/main.htm.

[56] Available at http://www.unidroit.org/english/principles/civilprocedure/main.htm.

[57] Available at http://www.ohada.com/traite.php?categorie=10.

[58] *Acts and Proceedings of the Diplomatic Conference for the adoption of the draft UNIDROIT Conventions on International Factoring and International Financial Leasing, Ottawa, 9-28 May 1988*, vol. I (Rome, Unidroit, 1991-1992) (also available at http://www.unidroit.org/english/conventions/1988leasing/main.htm).

[59] For information about the work of Unidroit, see http://www.unidroit.org.

[60] For the proceedings of the Congress, see document A/CN.9/SER.D/1; also published as a United Nations publication (Sales No. E.94.V.14).

[61] Available at http://www.swissarbitration.ch/rules.php.

[62] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 275.

[63] Ibid., para. 272.

Annex I

Draft Convention on the Use of Electronic Communications in International Contracts

The States Parties to this Convention,

Reaffirming their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Noting that the increased use of electronic communications improves the efficiency of commercial activities, enhances trade connections and allows new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

Considering that problems created by uncertainty as to the legal value of the use of electronic communications in international contracts constitute an obstacle to international trade,

Convinced that the adoption of uniform rules to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, would enhance legal certainty and commercial predictability for international contracts and help States gain access to modern trade routes,

Being of the opinion that uniform rules should respect the freedom of parties to choose appropriate media and technologies, taking account of the principles of technological neutrality and functional equivalence, to the extent that the means chosen by the parties comply with the purpose of the relevant rules of law,

Desiring to provide a common solution to remove legal obstacles to the use of electronic communications in a manner acceptable to States with different legal, social and economic systems,

Have agreed as follows:

Chapter I. Sphere of application

Article 1. Scope of application

1. This Convention applies to the use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different States.

2. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between the parties or from information disclosed by the parties at any time before or at the conclusion of the contract.

3. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 2. Exclusions

1. This Convention does not apply to electronic communications relating to any of the following:

(a) Contracts concluded for personal, family or household purposes;

(b) (i) Transactions on a regulated exchange; (ii) foreign exchange transactions; (iii) inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments; (iv) the transfer of security rights in, sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary.

2. This Convention does not apply to bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money.

Article 3. Party autonomy

The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.

Chapter II. General provisions

Article 4. Definitions

For the purposes of this Convention:

(a) "Communication" means any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract;

(b) "Electronic communication" means any communication that the parties make by means of data messages;

(c) "Data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

(d) "Originator" of an electronic communication means a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication;

(e) "Addressee" of an electronic communication means a party who is intended by the originator to receive the electronic communication, but does not include a party acting as an intermediary with respect to that electronic communication;

(f) "Information system" means a system for generating, sending, receiving, storing or otherwise processing data messages;

(g) "Automated message system" means a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system;

(h) "Place of business" means any place where a party maintains a non-transitory establishment to pursue an economic activity other than the temporary provision of goods or services out of a specific location.

Article 5. Interpretation

1. In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 6. Location of the parties

1. For the purposes of this Convention, a party's place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location.

2. If a party has not indicated a place of business and has more than one place of business, then the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

3. If a natural person does not have a place of business, reference is to be made to the person's habitual residence.

4. A location is not a place of business merely because that is: (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (b) where the information system may be accessed by other parties.

5. The sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.

Article 7. Information requirements

Nothing in this Convention affects the application of any rule of law that may require the parties to disclose their identities, places of business or other information, or relieves a party from the legal consequences of making inaccurate, incomplete or false statements in that regard.

CHAPTER III. USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS

Article 8. Legal recognition of electronic communications

1. A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.

2. Nothing in this Convention requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct.

Article 9. Form requirements

1. Nothing in this Convention requires a communication or a contract to be made or evidenced in any particular form.

2. Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

3. Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

(a) A method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

4. Where the law requires that a communication or a contract should be made available or retained in its original form, or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:

(a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and

(b) Where it is required that the information it contains be made available, that information is capable of being displayed to the person to whom it is to be made available.

5. For the purposes of paragraph 4 (a):

(a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and

any change that arises in the normal course of communication, storage and display; and

(b) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.

Article 10. Time and place of dispatch and receipt of electronic communications

1. The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.

2. The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.

3. An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6.

4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article.

Article 11. Invitations to make offers

A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.

Article 12. Use of automated message systems for contract formation

A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.

Article 13. Availability of contract terms

Nothing in this Convention affects the application of any rule of law that may require a party that negotiates some or all of the terms of a contract through the exchange of electronic communications to make available to the other party those electronic communications which contain the contractual terms in a particular manner, or relieves a party from the legal consequences of its failure to do so.

Article 14. Error in electronic communications

1. Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made if:

(a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication; and

(b) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.

2. Nothing in this article affects the application of any rule of law that may govern the consequences of any error other than as provided for in paragraph 1.

Chapter IV. Final provisions

Article 15. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

Article 16. Signature, ratification, acceptance or approval

1. This Convention is open for signature by all States at United Nations Headquarters in New York from [...] to [...].*

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

* Two years after its adoption by the General Assembly.

Article 17. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the regional economic integration organization shall not count as a Contracting State in addition to its member States that are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a "Contracting State" or "Contracting States" in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over any conflicting rules of any regional economic integration organization as applicable to parties whose respective places of business are located in member States of any such organization, as set out by declaration made in accordance with article 21.

Article 18. Effect in domestic territorial units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

4. If a Contracting State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 19. Declarations on the scope of application

1. Any Contracting State may declare, in accordance with article 21, that it will apply this Convention only:

(a) When the States referred to in article 1, paragraph 1, are Contracting States to this Convention; or

(b) When the parties have agreed that it applies.

2. Any Contracting State may exclude from the scope of application of this Convention the matters it specifies in a declaration made in accordance with article 21.

Article 20. Communications exchanged under other international conventions

1. The provisions of this Convention apply to the use of electronic communications in connection with the formation or performance of a contract to which any of the following international conventions, to which a Contracting State to this Convention is or may become a Contracting State, apply:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958);

Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980);

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980);

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 19 April 1991);

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995);

United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001).

2. The provisions of this Convention apply further to electronic communications in connection with the formation or performance of a contract to which another international convention, treaty or agreement not specifically referred to in paragraph 1 of this article, and to which a Contracting State to this Convention is or may become a Contracting State, applies, unless the State has declared, in accordance with article 21, that it will not be bound by this paragraph.

3. A State that makes a declaration pursuant to paragraph 2 of this article may also declare that it will nevertheless apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of any contract to which a specified international convention, treaty or agreement applies to which the State is or may become a Contracting State.

4. Any State may declare that it will not apply the provisions of this Convention to the use of electronic communications in connection with the formation or performance of a contract to which any international convention, treaty or agreement specified in that State's declaration, to which the State is or may become a Contracting State, applies, including any of the conventions referred to in paragraph 1 of this article, even if such State has not excluded the application of paragraph 2 of this article by a declaration made in accordance with article 21.

Article 21. Procedure and effects of declarations

1. Declarations under article 17, paragraph 4, article 19, paragraphs 1 and 2, and article 20, paragraphs 2, 3 and 4, may be made at any time. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

2. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.

3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

4. Any State that makes a declaration under this Convention may modify or withdraw it at any time by a formal notification in writing addressed to the depositary. The modification or withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

Article 22. Reservations

No reservations may be made under this Convention.

Article 23. Entry into force

1. This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article 24. Time of application

This Convention and any declaration apply only to electronic communications that are made after the date when the Convention or the declaration enters into force or takes effect in respect of each Contracting State.

Article 25. Denunciations

1. A Contracting State may denounce this Convention by a formal notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at New York, this [...] day of [...], [...], in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

Annex II

List of documents before the Commission at its thirty-eighth session

Symbol	*Title or description*
A/CN.9/567	Provisional agenda, annotations thereto and scheduling of meetings of the thirty-eighth session
A/CN.9/568	Report of Working Group I (Procurement) on the work of its sixth session (Vienna, 30 August-3 September 2004)
A/CN.9/569	Report of Working Group II (Arbitration and Conciliation) on the work of its forty-first session (Vienna, 13-17 September 2004)
A/CN.9/570	Report of Working Group VI (Security Interests) on the work of its sixth session (Vienna, 27 September-1 October 2004)
A/CN.9/571	Report of Working Group IV (Electronic Commerce) on the work of its forty-fourth session (Vienna, 11-22 October 2004)
A/CN.9/572	Report of Working Group III (Transport Law) on the work of its fourteenth session (Vienna, 29 November-10 December 2004)
A/CN.9/573	Report of Working Group II (Arbitration and Conciliation) on the work of its forty-second session (New York, 10-14 January 2005)
A/CN.9/574	Report of Working Group VI (Security Interests) on the work of its seventh session (New York, 24-28 January 2005)
A/CN.9/575	Report of Working Group I (Procurement) on the work of its seventh session (New York, 4-8 April 2005)
A/CN.9/576	Report of Working Group III (Transport Law) on the work of its fifteenth session (New York, 18-28 April 2005)
A/CN.9/577 and Add.1	Note by the Secretariat on the draft Convention on the Use of Electronic Communications in International Contracts
A/CN.9/578 and Add.1-17	Note by the Secretariat on the draft Convention on the Use of Electronic Communications in International Contracts: comments received from Member States and international organizations
A/CN.9/579	Note by the Secretariat on current work by other international organizations in the area of electronic commerce
A/CN.9/580	Note by the Secretariat on insolvency law: developments in insolvency law: adoption of the UNCITRAL Model Law on Cross-Border Insolvency; use of cross-border protocols and court-to-court communication guidelines; and case law on interpretation of "centre of main interests" and "establishment" in the European Union
A/CN.9/580/Add.1	Note by the Secretariat on coordination of work: current activities of international organizations related to insolvency law

Symbol	*Title or description*
A/CN.9/580/Add.2	Note by the Secretariat on insolvency law: developments in insolvency law: adoption of the UNCITRAL Model Law on Cross-Border Insolvency
A/CN.9/581	Note by the Secretariat on a bibliography of recent writings related to the work of UNCITRAL
A/CN.9/582 and Add.1-7	Note by the Secretariat on insolvency law: possible future work in the area of insolvency law
A/CN.9/583	Note by the Secretariat on the status of conventions and model laws
A/CN.9/584	Note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade law
A/CN.9/585	Note by the Secretariat on the interim report on the survey relating to the legislative implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
A/CN.9/586	Note by the Secretariat on technical assistance